Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SWISHER INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID M. COHEN
TODD M. HUGHES
Attorneys

Department of Justice
Washington, DC 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the jurisdiction of the Court of International Trade to award refunds of the Harbor Maintenance Tax rests upon the "protest" provisions of 28 U.S.C. 1581(a) when this Court held in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 365 (1998), that such jurisdiction is *not* provided by that statute but instead rests upon the "residual jurisdiction" of 28 U.S.C. 1581(i).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 205 F.3d 1358. The opinion of the Court of International Trade (App., *infra*, 24a-33a) is reported at 27 F. Supp. 2d 234.

JURISDICTION

The judgment of the court of appeals was filed on February 28, 2000. The petition for rehearing was denied on May 22, 2000. On August 10, 2000, Chief Justice Rehnquist extended the time for filing a peti-

tion for a writ of certiorari to and including September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 19 U.S.C. 1514 provides, in relevant part:

> (a) * * * [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery * * *;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the

United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title. * * *

* * * * *

(c)(3) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

* * * * *

2. 19 U.S.C. 1515 provides, in relevant part:

(a) Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section[,] the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. * * * Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action

contesting the denial of a protest under section 1514 of this title.

(b) A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed * * * to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1581 of title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing * * * shall be deemed denied on the thirtieth day following mailing of such request.

* * * * *

3. 28 U.S.C. 1581 provides, in relevant part:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * * * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section * * * , the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes * * * ; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

* * * * *

4. 28 U.S.C. 2636 provides, in relevant part:

(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or

(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 515(b) of such Act.

* * * * *

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

STATEMENT

1. This case presents an important question regarding the jurisdiction of the Court of International Trade over actions seeking to recover payments of the Harbor Maintenance Tax, 26 U.S.C. 4461, for exported goods.[1] As much as half a billion dollars may turn on the correct disposition of the question presented in this case. Even outside the context of the Harbor Maintenance Tax, the question presented in this case has substantial recurring importance for the routine administration of the customs laws.

In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that imposition of the Harbor Maintenance Tax on exported goods violates the Export Clause of the Constitution. In so holding, the Court addressed at length the jurisdiction of the federal courts to provide a remedy for that unconstitutional exaction. The Court first noted that Congress expressly provided that jurisdiction to entertain suits to recover such payments is *not* based upon the statutes that authorize tax refunds under the Internal Revenue Code. Instead, "Congress provided that, for administrative, enforcement, and jurisdictional purposes, the [Harbor Maintenance Tax] should be treated 'as if [it] were a customs duty.'" *Id.* at 367 (quoting 26 U.S.C. 4462(f)(1) and (2)).

The Court of International Trade has been given "exclusive jurisdiction" over specified actions involving customs duties under 28 U.S.C. 1581. In *United States Shoe Corp.*, this Court concluded that "the [Court of

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[1] The Harbor Maintenance Tax was enacted by Congress to fund harbor facilities developed and maintained by the United States. It imposes a tax of "0.125 percent of the value of the commercial cargo" to which it applies. 26 U.S.C. 4461(b).

International Trade] properly entertained jurisdiction" under this statute to provide a refund of the taxes imposed on exports under the Harbor Maintenance Tax. 523 U.S. at 365. The Court noted that the complaint in that case had "alleged exclusive original jurisdiction * * * under 28 U.S.C. § 1581(a) or, alternatively, § 1581(i)," and the Court "agree[d] with the [Court of International Trade] and the Federal Circuit that § 1581(i) is the applicable jurisdictional prescription." *Ibid.* The Court explained its jurisdictional holding in detail (*id.* at 365-366) (emphasis added):

> Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the CIT in "any civil action commenced to contest the [Custom Service's] denial of a protest." A protest, as indicated in 19 U.S.C. § 1514, is an essential prerequisite when one challenges an actual Customs decision.[2] As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F.3d, at 1569.
>
> Section 1581(i) describes the CIT's residual jurisdiction over

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[2] 19 U.S.C. 1514 authorizes a protest only from "decisions of the Customs Service" concerning matters such as the value of imported merchandise, its classification, the rates of applicable duties, other charges and exactions within the jurisdiction of the Treasury, and the liquidation or reliquidation of an entry. 19 U.S.C. 1514(a).

> "any civil action commenced against the United States . . . that arises out of any law of the United States providing for—
>
> "(1) revenue from imports or tonnage;
>
> . . . . .
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . ."

This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F.3d, at 1571. * * * In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§] 1581(i)(1)." 907 F. Supp., at 421. Accordingly, *CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4).*

2. In the present case, however, respondent sought to recover Harbor Maintenance Tax payments on exported goods by invoking the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a) instead of 28 U.S.C. 1581(i). The Court of International Trade dismissed the suit because this Court's decision in *United States Shoe Corp.* "makes clear that there is no protestable Customs decision with respect to the con-

stitutionality of HMT." App., *infra*, 29a. See note 2, *supra*.

The court noted that the different jurisdictional theories that had been raised in the alternative by the taxpayer in *United States Shoe Corp.* would yield different statutes of limitations for such actions. The statute of limitations for actions commenced in the Court of International Trade under 28 U.S.C. 1581(i) is two years from the date "the cause of action first accrues." 28 U.S.C. 2636(i). By contrast, an action under 28 U.S.C. 1581(a) to "contest the denial of a protest" may be commenced at any time within one hundred and eighty days after the notice of denial is mailed by the agency (under 19 U.S.C. 1515(a)) or the protest has been deemed to have been denied by operation of law (under 19 U.S.C. 1515(b)).[3] 28 U.S.C. 2636(a)(1) and (2). Because the present action was not commenced until approximately four years after some of the taxes had been paid, the court noted that "some of [respondent's] claims will be time[] barred unless jurisdiction is also cognizable under § 28 U.S.C. 1581(a)." App., *infra*, 26a.

The court explained, however, that respondent's jurisdictional theory had been expressly considered and expressly rejected in the *United States Shoe Corp.* case, in which respondent had "participated as an *amicus curiae* before both this court and the Court of Appeals for the Federal Circuit." App., *infra*, 26a. The courts

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[3] A protest of a customs "decision" filed in accordance with 19 U.S.C. 1514 (see note 2, *supra*) must be decided by the agency within two years of the date it is filed. 19 U.S.C. 1515(a). If a request for accelerated disposition of the protest is filed with the agency, however, the protest will be "deemed denied on the thirtieth day following mailing of such request." 19 U.S.C. 1515(b).

had unanimously concluded in that prior case that "jurisdiction over suits to recover HMT on exports [lies] under 28 U.S.C. § 1581(i), the residual jurisdiction of the court." *Id.* at 27a. The court explained that Section 1581(i) applies as "residual jurisdiction" precisely because (*ibid.*)

> none of the other sections of 28 U.S.C. § 1581 are available for relief. *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 108 S. Ct. 773, 98 L.Ed.2d 859 (1988) (citing cases). This means that if one had the opportunity for access to the court under 28 U.S.C. § 1581(a), * * * there is no § 1581(i) jurisdiction. *Lowa, Ltd.* v. *United States*, 5 CIT 81, 88, 561 F. Supp. 441, 446-47 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984).

The court rejected respondent's argument that the refusal of the Customs Service to grant refund claims filed by respondent in 1994, and the subsequent refusal of the agency to grant respondent's "protest" from the denial of the requested refund claims, resulted in a "decision regarding the 'amount of duties chargeable'" that comes within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 29a (quoting 19 U.S.C. 1514(a)(2)). The court explained that, under the holding of this Court in *United States Shoe Corp.*, "there is no protestable Customs decision with respect to the constitutionality of HMT" and that "[i]t would be incongruous to permit conversion of 'no decision' into a protestable decision, by means of the unilateral choice of the exporter to seek a refund at any time of its choosing." *Ibid.* The court concluded that "a plaintiff cannot unilaterally grant itself a new limitations period by making a refund request whenever it so chooses" and that respondent's

jurisdictional contentions are barred by the decision of this Court in *United States* v. *United States Shoe Corp.*, 523 U.S. at 366. App., *infra*, 33a.

3. The court of appeals reversed. App., *infra*, 1a-23a. The court acknowledged that, in *United States Shoe Corp.*, the Court of International Trade and the Federal Circuit had both rejected the very jurisdictional argument raised by respondent in this case. The court noted that in that prior litigation it had concluded that Section 1581(i) was the proper basis for jurisdiction because Customs does not make a protestable "decision with respect to the constitutionality of the HMT" that would be within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 12a. The court of appeals also acknowledged that this Court had held in *United States Shoe Corp.* that jurisdiction over HMT refund cases rests upon Section 1581(i) and is *not* founded upon Section 1581(a), because the Customs Service makes no protestable "decision" in simply collecting the tax on exports in the precise manner that Congress directed. *Ibid.* (citing 523 U.S. at 365).

Notwithstanding these clear holdings, the court of appeals stated that "the *implications* of the decisions in *U.S. Shoe*" are not binding in this case and do not require rejection of respondent's renewed assertion of its jurisdictional theory. App., *infra*, 11a (emphasis added). The court stated that in *United States Shoe Corp.* this Court merely held that "acceptance" of the unconstitutional tax by the Customs Service is not itself a protestable "decision" within the meaning of 19 U.S.C. 1514. App., *infra*, 14a. The court stated that the present case is different because (i) respondent applied for a refund with the Customs Service, (ii) its refund request was denied, (iii) respondent then "protested"

the denial of its refund request, and (iv) respondent thereafter sought review of the denial of its protest in the Court of International Trade. *Id.* at 15a-23a. The court concluded that the agency's initial denial of the requested refund was a protestable "decision" and that the agency's subsequent denial of that "protest" was then reviewable by the Court of International Trade under the jurisdiction provided by 28 U.S.C. 1581(a).[4] App., *infra*, 23a.

In so holding, the court of appeals acknowledged (App., *infra*, 13a) that it is well established that the "residual" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available * * * ." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988). The court of appeals therefore did not dispute that the conclusion reached by this Court in *United States Shoe Corp.*—that actions to recover unconstitutional Harbor Maintenance Tax exactions are within the "residual" jurisdiction of Section 1581(i)—is necessarily premised on the understanding that jurisdiction under Section 1581(a) neither was nor "could have been available" to the taxpayer in that case. The court of appeals nonetheless stated that the jurisdictional holding in *United States Shoe Corp.* "was merely that, given the procedural posture of that case, section 1581(i) residual jurisdiction was the appropriate jurisdictional basis" and that

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[4] The Customs Service in fact took no action upon respondent's purported "protest." Respondent contends that its "protest" was denied by operation of law under 19 U.S.C. 1515(b) when the agency declined to act upon the protest within thirty days. App., *infra*, 25a. See note 3, *supra*.

nothing in that decision dictates that "only one possible procedure [exists] for challenging the export HMT." App., *infra*, 14a.

Finally, the court of appeals disagreed with the concern expressed by the Court of International Trade that respondent's theory would undermine the applicable statute of limitations by "allow[ing] a plaintiff to convert the 'no decision' of HMT payment acceptance into a protestable decision merely by filing a refund request." App., *infra*, 19a. The court of appeals stated (*id.* at 20a):

> While we agree with the principle * * * that courts should be cautious not to deprive one party of the repose intended by a statute of limitations by allowing another party to accrue a cause of action at will, that is not the situation in this case. Swisher did not sleep on its constitutional claims * * * . Rather, Swisher promptly filed its request for a refund in 1994, at the same time that many other exporters began to question the constitutionality of the HMT as it applied to exports.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals directly conflicts with the decision of this Court in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). It also abandons and disrupts the settled precedents that prescribe and limit the jurisdiction of the Court of International Trade. The decision in this case thus has substantial recurring importance in the administration of the customs laws.

The Court of International Trade has exclusive jurisdiction over the customs disputes specified in 28 U.S.C. 1581. The Federal Circuit has exclusive jurisdiction

over appeals from the Court of International Trade. 28 U.S.C. 1295(a)(5). The decision in this case is thus nationwide in its effect. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 383 (1999); *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

1. Two possible routes have been proposed by the parties and considered by the courts for the recovery of customs exactions improperly imposed on exported goods. In *United States Shoe Corp.*, 523 U.S. at 365-366, this Court expressly rejected reliance upon 28 U.S.C. 1581(a) as a jurisdictional basis for such actions. That statute provides jurisdiction to the Court of International Trade to review "the denial of a protest" issued by the Customs Service under 19 U.S.C. 1515. See 28 U.S.C. 1581(a); note 2, *supra*. Under 19 U.S.C. 1515, the Customs Service may "allow or deny" any protest "filed in accordance with [19 U.S.C.] 1514." In turn, 19 U.S.C. 1514 authorizes the filing of a "protest" from "decisions of the Customs Service" concerning specified matters such as "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury," and "the liquidation or reliquidation of an entry." 19 U.S.C. 1514(a). As this Court emphasized in *United States Shoe Corp.*, this jurisdictional route is inapplicable to cases challenging the constitutionality of the Harbor Maintenance Tax on exported goods because a "protest" can be made under 19 U.S.C. 1514

only "when one challenges an actual Customs decision." 523 U.S. at 365. No "actual Customs decision" is involved in connection with a taxpayer's claim that the Harbor Maintenance Tax is unconstitutional because "Customs performs no active role, it undertakes no analysis [or adjudication], issues no directives, imposes no liabilities; instead, Customs merely passively collects HMT payments." *Ibid.* (internal quotation marks omitted).

Because 28 U.S.C. 1581(a) is not an available route for challenging the constitutionality of the tax on exports, this Court concluded in *United States Shoe Corp.* that the correct jurisdictional basis for such suits is 28 U.S.C. 1581(i). That statute "describes the CIT's residual jurisdiction" (523 U.S. at 365) over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports or tonnage" or the "administration and enforcement" of such laws. 28 U.S.C. 1581(i)(1)-(4). Since Congress specified in 26 U.S.C. 4462(f)(2) that the Harbor Maintenance Tax is to "be treated as a customs duty for purposes of jurisdiction" (523 U.S. at 366 (quoting 907 F. Supp. at 421)), this Court held that the "residual jurisdiction" afforded by Section 1581(i) is the correct jurisdictional basis for suits challenging the constitutionality of the HMT on exported goods. 523 U.S. at 366.[5]

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[5] In the *United States Shoe Corp.* case, respondent filed a brief as *amicus curiae* in the Federal Circuit and in the Court of International Trade, setting forth the same jurisdictional contentions that it urges here. See 114 F.3d at 1566. Those courts rejected respondent's contentions in that case. The Federal Circuit noted that the dispute as to "whether subsection (a) or subsection (i) of section 1581 applies * * * exists" solely because of the differing statutes of limitations that govern actions brought

Section 1581(i) is referred to as the "residual" jurisdiction of the Court of International Trade because that "jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is *or could have been* available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (emphasis added), cert. denied, 484 U.S. 1041 (1988). In particular, jurisdiction does not exist under Section 1581(i) when exporters "could have taken steps to qualify" under Section 1581(a) by filing a protest from a "decision" made by Customs under 19 U.S.C. 1514. 824 F.2d at 963 (citing *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984)). The legislative history of Section 1581 makes clear that "Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." *United States* v. *Uniroyal, Inc.*, 687 F.2d 467,

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under these separate provisions. *Id.* at 1568. The court explained that Section 1581(a) does not afford jurisdiction because that statute "applies to suits commenced to contest the denial of a protest" and Customs makes no "protestable decision" in "merely passively collect[ing] payments calculated by the exporters pursuant to statutes and regulations." *Id.* at 1569. The court explained that "there was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress." *Id.* at 1570. The court concluded that jurisdiction therefore does not exist under Section 1581(a) but instead exists under the "broad residual authority" in the "default provision" of Section 1581(i), which applies "when jurisdiction under any of the other subsections is unavailable or manifestly inadequate." *Id.* at 1570-1571.

471 (C.C.P.A. 1982).[6] It has therefore consistently been held that Section 1581(i) does not apply "where the litigant has failed to exhaust [an available] avenue of protest and denial" before the Customs Service. *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d at 1549.

It was precisely *because* a "protestable decision" by the Customs Service is *not* involved in that agency's collection of the Harbor Maintenance Tax on exported goods that this Court held that the "residual jurisdiction" of the Court of International Trade under Section 1581(i) may be invoked. *United States Shoe Corp.*, 523 U.S. at 365. If an exporter "could have taken steps" to obtain a "protestable decision" on its constitutional objections to that tax from the agency, its failure to do so would have precluded jurisdiction over such an action in the Court of International Trade under Section 1581(i).

2. a. In the present case, the court of appeals reached a jurisdictional conclusion that is precisely at odds with the decision of this Court in *United States Shoe Corp.* The court of appeals concluded in this case that suits to recover HMT payments on exported goods may be brought in the Court of International Trade under Section 1581(a), rather than under Section 1581(i). That holding directly conflicts with this Court's holding in *United States Shoe Corp.* that there is no "actual Customs decision" in the agency's administra-

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[6] In providing jurisdiction in the Court of International Trade for pre-importation review of a classification or valuation ruling without the requirement of a protest under 28 U.S.C. 1581(h), Congress "deleted from the bill the language of its predecessors which could be read as permitting such review when the transaction in question had already taken place." *United States* v. *Uniroyal, Inc.*, 687 F.2d at 471-472. See also *id.* at 471 nn. 11-13.

tion and enforcement of the HMT on exported goods. 523 U.S. at 365. Indeed, if, as the court of appeals has concluded, a protestable decision "could have been available" to the taxpayer in *United States Shoe Corp.*, and the taxpayer thus "could have taken steps" to obtain jurisdiction under Section 1581(a), then jurisdiction would *not* properly have existed in that case under Section 1581(i). See *Miller & Co.* v. *United States*, 824 F.2d at 963; pages 15-17, *supra*. The reasoning and conclusion of the court of appeals in the present case thus flatly repudiate the holding of this Court in *United States Shoe Corp.*[7]

b. The court of appeals failed to justify its disregard of the explicit holding of this Court that no "actual" and protestable "Customs decision" is made in the agency's enforcement of the HMT on exports (523 U.S. at 365).[8]

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[7] The court of appeals also misdescribed its own precedent in stating that *Miller* and related case law stand only for the proposition that a party may not "assert[] residual (subsection (i)) jurisdiction when jurisdiction under another subsection would be appropriate. In *U.S. Shoe*, another basis [for jurisdiction] was not available; here it is." App., *infra*, 13a. In fact, *Miller* and the cases that it cites stand for the markedly different proposition that the "residual jurisdiction" afforded under Section 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is *or could have been* available." 824 F.2d at 963 (emphasis added). The conclusion that "residual jurisdiction" existed under Section 1581(i) in *United States Shoe Corp.* was thus both *actually* and *necessarily* premised on the conclusion that jurisdiction for the recovery of HMT payments was not available under Section 1581(a) because no "actual Customs decision" was involved in the agency's enforcement of the HMT on exported goods. 523 U.S. at 365.

[8] The refusal of the court of appeals to abide by the precedent of this Court in *United States Shoe Corp.* is especially surprising in view of the fact that the arguments submitted by respondent were

The court of appeals simply disagreed with that conclusion in stating that the agency makes a protestable "decision" when it declines to allow a refund of the tax. App., *infra*, 23a. The court's reasoning fails to consider the text of the statute: it is only decisions of the type described in 19 U.S.C. 1514(a) that support a "protest" that may be reviewed first by the agency (under 19 U.S.C. 1515) and thereafter by the Court of International Trade (under 28 U.S.C. 1581(a)). In declining a request for a refund of the Harbor Maintenance Tax on exports submitted only on the grounds that the tax is unconstitutional, the agency does not determine "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," or make any of the other discrete determinations that support a "protest" under 19 U.S.C. 1514(a).[9]

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fully briefed and considered in that prior case. See 523 U.S. at 365-366; 114 F.3d at 1566, 1568-1570.

[9] By contrast, the agency's decision to deny a return of HMT payments that had been requested upon one of the grounds specified in 19 U.S.C. 1514(a)—such as an erroneous valuation of the merchandise to which the tax applies (19 U.S.C. 1514(a)(1))—could support a "protest," the denial of which would be within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). The court of appeals failed to understand this distinction in asserting (App., *infra*, 15a-17a) that the mere fact that the agency's regulations permit the submission of refund requests for the HMT means that a refusal to grant such a request is necessarily a "decision" of an issue for which a protest is allowed under the statute. The Court of International Trade, by contrast, correctly noted that the denial of a refund request submitted solely on constitutional grounds does *not* represent a "decision" of any issue for which protest is authorized under 19 U.S.C. 1514. App., *infra*, 29a. As the Court of International Trade correctly observed, even if application of the HMT to exports could give rise to a protestable "decision" in some situations, no protestable "de-

As this Court concluded in *United States Shoe Corp.*, none of the "actual Customs decisions" described in 19 U.S.C. 1514(a) is involved in a taxpayer's demand for repayment of an unconstitutional Harbor Maintenance Tax. 523 U.S. at 365. In enforcing the Harbor Maintenance Tax on exports against the constitutional objections of taxpayers, the agency makes no "actual * * * decision," for it "performs no active role, it undertakes no analysis [or adjudication], issues no directives, imposes no liabilities." *Ibid.* (internal quotation marks omitted). The contrary holding of the court of appeals in this case simply neglects to consider the text of the applicable statute and the reasoning and holding of this Court in *United States Shoe Corp.*, 523 U.S. at 365-366. By contrast, the Court of International Trade correctly concluded in this case that the decision of this Court in *United States Shoe Corp.* "makes clear that there is no protestable Customs decision with respect to the constitutionality of HMT" on exported goods. App., *infra*, 29a. See also note 9, *supra*.

3. The decision in this case does more than simply refuse to apply a controlling precedent of this Court. It fails to accord proper respect to the limitations specified by Congress in waiving the government's sovereign immunity from suit. Cf. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). By thus undermining the statutes of limitations that govern customs cases, the decision creates confusion in the law for both taxpayers and the United States.

The reasoning applied by the court of appeals in distinguishing the decision of this Court in *United States Shoe Corp.* is that the "residual jurisdiction" of

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cision" is made by the agency in connection with a "dispute over the constitutionality of the HMT statute." *Id.* at 33a.

the Court of International Trade under 28 U.S.C. 1581(i) applies whenever, on "the procedural posture" of the case, no other jurisdictional theory would then be applicable. App., *infra*, 12a-14a. Under that rationale, a taxpayer who wishes to challenge a customs exaction could claim that he has a choice either to (i) proceed directly to the Court of International Trade, without filing any protest, and invoke the "residual jurisdiction" of that court under 28 U.S.C. 1581(i), or (ii) instead submit a claim for refund, "protest" its denial and seek review of the denial under the "protest" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 23a. Because the statute of limitations differs depending on whether jurisdiction in the Court of International Trade is based upon Section 1581(a) or 1581(i) (see page 5, *supra*), the decision of the court of appeals in this case would improperly "put control" of the statute of limitations "in the hands of" the taxpayer. *Id.* at 29a. The specification by Congress of two *different* statutes of limitations would thereby be rendered meaningless in this context—except as a mere target for evasion.

By refusing to adhere to the controlling precedent of this Court, the court of appeals has provided a different statute of limitations to the set of taxpayers involved in this case than was afforded to the taxpayers in *United States Shoe Corp.* This differing treatment yields an inconsistent remedy among similarly situated taxpayers. Review by this Court is needed to ensure that the same rules of law apply to similarly situated claimants, to achieve compliance with congressionally specified limitations on the waiver of the sovereign immunity of the United States, and to mandate proper compliance by the Federal Circuit with a directly controlling decision of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID M. COHEN
TODD M. HUGHES
Attorneys

SEPTEMBER 2000

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[10] In light of this Court's detailed consideration of the issue presented here in its recent decision in *United States Shoe Corp.* (see pages 7-8, *supra*), the Court may wish to consider summary reversal.

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 99-1277

SWISHER INTERNATIONAL, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: Feb. 28, 2000]
[Rehearing and Suggestion for
Rehearing En Banc Denied May 22, 2000]

Before: NEWMAN, MICHEL, and PLAGER, Circuit Judges.

MICHEL, Circuit Judge.

Swisher International, Inc. ("Swisher") appeals from a summary judgment for the government by the United States Court of International Trade, dismissing some of its claims for a refund of the unconstitutional Harbor Maintenance Tax ("HMT") as time barred. *See Swisher Int'l, Inc. v. United States*, 27 F. Supp.2d 234 (Ct. Int'l Trade 1998). The court held that 28 U.S.C. § 1581(i) (1994), not 28 U.S.C. §1581(a), is the proper basis of

jurisdiction for this constitutional challenge to the application of the HMT to exports. The court ruled that a Customs Service decision to deny a refund request based on such a challenge was not a decision subject to protest under 19 U.S.C. § 1514(a) and thus cannot support Court of International Trade jurisdiction under 28 U.S.C. § 1581(a). Since under the HMT regulation there is no time limit for filing a request for refund of the HMT,[1] if its denial were protestable, the refund claims in the complaint would not have been dismissable, given that Swisher had timely filed its protest and the subsequent Court of International Trade suit when the protest was denied. The court thus held that 28 U.S.C. § 1581(i), affording the Court of International Trade residual jurisdiction, was the exclusive jurisdictional basis for this suit. Because it held that jurisdiction arose under section 1581(i), the court entered judgment for the United States on all of Swisher's claims that were barred by the two-year statute of limitations applicable to that subsection.[2] The court entered judgment for Swisher on the claims related to

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[1] 26 U.S.C. §§ 4461, 4462, the statute authorizing the HMT, contains no discussion of refunds. The governing regulation merely specifies that a refund shall be requested by mailing Customs Form 350 to a designated address; no time period for filing a refund request is discussed. *See* 19 C.F.R. § 24.24(e)(5) (1998).

[2] The applicable statute of limitations is 28 U.S.C. § 2636(i) (1994) which provides:

> . . . (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)—(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

HMT paid within the two-year statute of limitations. Swisher timely appealed to this court and the appeal was submitted for our decision on December 10, 1999, following oral argument. Because a denial of a requested refund, we hold today, is a decision as to a charge or exaction and thus protestable, we reverse the judgment of the Court of International Trade dismissing those claims, and in light of the settled case law holding the HMT unconstitutional when applied to exports, remand for a refund calculation on all claims.

BACKGROUND

The Harbor Maintenance Tax, 26 U.S.C. § 4461, was enacted in 1986 as a means of funding maintenance of the nation's ports. The tax was enacted as part of the Water Resources Development Act ("WRDA") and operates by imposing a fee on commercial vessels using the ports. The tax was assessed on importers, exporters, domestic shippers and commercial passenger transport.[3] *See* 26 U.S.C. §§ 4461, 4462 (1994). The revenues from the HMT are used to fund WRDA projects undertaken largely by the Army Corps of Engineers. The Department of Defense is authorized to undertake the maintenance and development projects, through the Secretary of the Army. The HMT portion of the statute is implemented by the Secretary

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[3] The application of the HMT to exports was found unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). Application of the HMT to commercial passenger transport, however, was held constitutional by this court. *See Carnival Cruise Lines v. United States*, 200 F.3d 1361 (Fed. Cir. 2000). Cases addressing the constitutionality of the HMT as applied to imports are still pending at the time of this decision.

of the Treasury, via the Customs Service. *See* 26 U.S.C. § 4462(i) (1994).

Congress authorized Customs to promulgate regulations and establish appropriate administrative procedures to implement the HMT. 26 U.S.C. § 4462(i). Congress also instructed that the tax should be administered and enforced as if it were a customs duty. 26 U.SC. § 4462(f)(1). Customs created a procedure in which the exporter was liable for the HMT at the time it loaded the cargo, but was not required to pay the HMT until the end of the quarter. 19 C.F.R. § 24.24(e)(2) (1998). Quarterly payments were required to be submitted accompanied by the "Harbor Maintenance Fee Quarterly Summary Report" (Customs Form 349) within 31 days of the end of the quarter. 19 C.F.R. § 24.24(f). Exporters could make supplemental payments or request refunds of overpayments by filing a Harbor Maintenance Fee Amended Quarterly Summary Report (Customs Form 350). *Id.* at § 24.24(e)(5).

Customs Form 350 provided four specific factual or legal reasons for requesting a refund, as well as a fifth general, catch-all provision: "(1) Calculations/ Clerical Error; (2) Duplication of Payment; (3) Misinterpretation of Exemption; (4) Overvaluation of Shipments; (5) Other—Please Specify -." Neither Customs Form 350 nor the refund regulations contain any time limit for making a supplemental payment or requesting a refund of export HMT. *Id.*

Appellant Swisher paid HMT from the fourth quarter of 1990 through the second quarter of 1994. Swisher then sought a refund of all HMT paid, on the sole ground that its exports were exempt from the tax

under Article I, Section 9, Clause 5 of the Constitution.[4] Unlike many other exporters seeking to challenge the constitutionality of the HMT, Swisher sought its refund by filing on September 28, 1994 Amended Quarterly Summary Reports for each quarter that it had paid the HMT. Swisher used the catch-all "other" category and specified "[s]hipments exempt from tax under Article I, Section 9, Clause 5, United States Constitution" as the basis for its refund.

Customs denied Swisher's refund request in a letter dated October 26, 1994. Customs denied the request on the grounds that the HMT was a constitutional fee and alternatively that the request was not timely filed for some of the HMT at issue. The Customs letter in response to Swisher's refund request appeared to treat Swisher's refund request as a "protest" and advised Swisher that it could "file a civil action contesting the denial of this protest under 19 U.S.C. § 1514 in the Court of International Trade."

On November 21, 1994, Customs published a Federal Register notice promulgating procedures for protests concerning the constitutionality of the export HMT. The procedures instructed that protests were to be filed within 90 days of collection by Customs, on Customs Form 19 (the standard Customs protest form), in letter form, or in the form of statements of protest affixed to the Quarterly Summary Report normally used to file HMT payments. *User Fee Protests*, T.D.

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[4] The clause states:

> No Tax or Duty shall be laid on Articles exported from any State.

U.S. Const. Art. I § 9, 5.

94091, 59 Fed.Reg. 60,044 (1994). Instead of filing an action in the Court of International Trade as instructed in the refund denial letter of October 26, Swisher filed, on November 23, 1994, a protest on Customs Form 19, challenging the denial of its refund requests. On February 24, 1995, Swisher requested accelerated disposition of its protest. Accelerated requests are deemed denied as a matter of law if no action has been taken within 30 days of the request for accelerated disposition. *See* 19 U.S.C. § 1515. When, because of the acceleration request, the Swisher protest was denied as a matter of law on March 26, 1995, Swisher filed this action with the Court of International Trade on March 29, 1995. The action was stayed immediately upon filing pending the outcome of *United States v. United States Shoe Corporation*, a previously filed challenge to the export HMT. *See* 907 F. Supp. 408 (Ct. Int'l Trade 1995) (holding that the HMT was unconstitutional when applied to exports), *affirmed United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), *affirmed United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L.Ed.2d 453 (1998).

Swisher participated in the *U.S. Shoe* case as an *amicus curiae*, asserting a unique jurisdictional argument, that the denial of an HMT refund request pursuant to the governing regulation, 19 C.F.R. § 24.24(e)(5), is a protestable decision and thus subsection 1581(a) provides the appropriate basis for Court of International Trade jurisdiction. The parties in *U.S. Shoe* asserted slightly different jurisdictional arguments. In *U.S. Shoe*, the government argued that jurisdiction was proper under section 1581(a) because the decision by Customs to accept the HMT was a

protestable decision. The plaintiff in *U.S. Shoe* argued that jurisdiction was proper under subsection 1581(i).

The relevant portions of the jurisdictional statute state:

> (a) The Court of International Trade Shall have exclusive jurisdiction of any civil action *commenced to contest the denial of a protest*, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> . . .
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581 (1994) (emphasis added).

The statute defines a protestable decision as:

> . . . decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) *all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury*;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (c) or (d) of section 1520 of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . .

19 U.S.C. § 1514(a) (emphasis added).

In *U.S. Shoe* the Court of International Trade rejected the government's theory that acceptance of the HMT payment by Customs was a protestable decision. Accordingly, the court held that section 1581(i) was the proper basis for jurisdiction. The court also rejected Swisher's jurisdictional theory in dicta, stating that Customs does not have the power to decide the constitutionality of the HMT and therefore could not issue a protestable decision pursuant to the refund provision of section 24.24(e)(5). *See U.S. Shoe*, 907 F. Supp. 408, 421 (Ct. Int'l Trade 1995).

This court heard *U.S. Shoe* on appeal. *See* 114 F.3d 1564 (Fed. Cir. 1997). While not addressing Swisher's argument directly, the panel did state that section 1581(a) was "not directly applicable" because "it applies to suits commenced to contest the denial of a protest." *U.S. Shoe*, 114 F.3d at 1569. This court then found the HMT unconstitutional when applied to exports. The government appealed the constitutional ruling to the Supreme Court, but did not appeal the jurisdictional holding. Nevertheless, the Supreme Court observed that the "[Court of International Trade] properly entertained jurisdiction in this case" noting that Customs has not issued a decision but "merely passively collect[ed] HMT payment." 523 U.S. at 365, 118 S. Ct. at 1293.

Following the Supreme Court decision in *U.S. Shoe*, the Court of International Trade designated a number of test cases to resolve outstanding HMT issues. *Swisher* was designated a "test case" to resolve the question of whether the denial of a request for refund of the export HMT is a protestable Customs Service decision such that subsequent Court of International Trade jurisdiction is proper under section 1581(a). On

summary judgment, the Court of International Trade held that the denial of a refund request was not a protestable decision and thus jurisdiction was not proper under section 1581(a). That court then held that section 1581(i) residual jurisdiction was proper and the two-year statute of limitations on actions under section 1581(i) was applicable, thus barring Swisher's claims for a refund of all HMT paid prior to October 27, 1992. *See Swisher Int'l, Inc. v. United States*, 27 F. Supp.2d 234. Swisher timely appealed to this court.

This court has jurisdiction over this appeal, as it seeks review of a final decision of the Court of International Trade, pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

On appeal, Swisher asserts that denial of a refund request made pursuant to 19 C.F.R. § 24.24(e)(5) on any ground, including that the "export HMT" is unconstitutional, is a protestable decision. Hence, Swisher argues, because it followed all of the required procedures to protest Customs' denial of the refund request and that protest was denied, the Court of International Trade's jurisdiction rested on 28 U.S.C. § 1581(a).

The Court of International Trade held, and the government argues, that section 1581(a) cannot be the proper basis of jurisdiction because this court has already decided that section 1581(i) is the proper basis of jurisdiction for a lawsuit challenging the constitutionality of the HMT. The crux of the government's argument is that because by its very terms subsection (i) is only applicable when *no* other subsection is

available, if there had been a basis for invoking subsection (a) jurisdiction in export HMT challenges, then the *U.S. Shoe* plaintiff would have been required to do so. As the Supreme Court, like this court, found section 1581(i) jurisdiction proper for the *U.S. Shoe* plaintiff, the government argues, both courts must have determined that subsection (a) jurisdiction was *not* available for constitutional challenges to the export HMT. Finally, the government argues that denial of such a refund request cannot be a protestable decision because such a holding would "eviscerate" the statute of limitations by allowing an exporter to accrue a cause of action at any time it chose simply by filing a request for a refund. The government further argued that since only final decisions of Customs are protestable the denial of a refund request cannot be protestable because the refund request is a voluntary procedure. The Court of International Trade also reasoned that the request for refund was not a mandatory procedure, because this court did not require the *U.S. Shoe* plaintiff to file a refund request. In further support of this argument, the Court of International Trade points again to the open ended time for filing a refund request as evidence that the procedure is not mandatory.

Thus, the principal issue before us is whether, in light of the implications of the decisions in *U.S. Shoe*, the denial of Swisher's refund request can be a protestable decision within the meaning of 19 U.S.C. § 1514(a), thus giving rise to the trial court's jurisdiction under section 1581(a). This is a question of law, and thus is subject to *de novo* review in this court, *see Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992), as is the instant grant of summary judgment itself. We address first whether either decision in *U.S. Shoe* precludes our

founding jurisdiction in the trial court on section 1581(a), and second, if not, whether, under 19 U.S.C. § 1514(a), Customs' denial of Swisher's refund request resulted in a protestable decision, a pre-requisite of section 1581(a) jurisdiction.

I.

The Supreme Court's and this court's opinions in *U.S. Shoe* both stated that in that case there was no protestable Customs decision with respect to the constitutionality of the HMT. *See* 523 U.S. at 363-68, 118 S. Ct. at 1293-94 ("protests are not pivotal, for Customs 'performs no active role,' it undertakes no analysis . . . instead merely 'passively collects' HMT payments.") (quoting *U.S. Shoe*, 114 F.3d at 1569). The courts therefore allowed the suits although they were filed in the Court of International Trade without a prior protest. Thus, the government argues, we cannot now find that Swisher accrued a protestable decision simply by filing a refund request, albeit a constitutionally-inspired one. Swisher argues, however, that because the *U.S. Shoe* plaintiff had filed neither a refund request nor a protest of denial of a refund request, the holding in that case is not applicable here, where Swisher did file a refund request and, when it was denied, a protest, which was also denied. We agree with Swisher.

In *U.S. Shoe*, the government argued that Customs' mere *acceptance* of the exporter's payment of the HMT was a "decision" of Customs subject to protest. Because the *U.S. Shoe* plaintiff had not protested the collection, but filed directly in the court below, the government said that suit had no jurisdictional basis. It was only this argument that the Supreme Court, like

our court, rejected in holding that there was no protestable decision and thus no jurisdiction under section 1581(a). Neither our decision nor that of the Supreme Court, however, reached the question of whether section 1581(a) jurisdiction would have been available had a protest been filed and denied following the filing and denial of a refund request. Thus *U.S. Shoe* does not preclude our consideration of section 1581(a) jurisdiction in this case where a refund request and protest were, in turn, filed and denied.

This court has indeed stated that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under any other subsection of section 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Nevertheless, the *U.S. Shoe* interpretation of the jurisdictional statute does not control subsequent suits asserting similar challenges but in different procedural postures. Moreover, our holding in *Miller* (and other decisions) is meant merely to prevent a party from asserting residual (subsection (i)) jurisdiction when jurisdiction under another subsection would be appropriate. In *U.S. Shoe*, another basis was not available; here it is.

Swisher pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff. In addition, it appears that there was much confusion in Customs and among exporters as to the proper procedure for challenging the constitutionality of the HMT as applied to exports. Indeed, Customs had published a Federal Register notice urging that parties file a protest within 90 days

of collection of the tax by Customs to challenge the constitutionality of the export HMT, *see User Fee Protests*, 59 Fed. Reg. 60,044, after some plaintiffs had filed in district court and others, like the *U.S. Shoe* plaintiff, filed first in the Court of International Trade, all without prior refund requests or protests. Thus, at the time, there was not one obvious jurisdictional basis that this court could have required the *U.S. Shoe* plaintiff to use, and the court rejected the jurisdictional basis advocated by Customs in its arguments and in the Federal Register notice.

Our holding in *U.S. Shoe* that there was no protestable decision was limited to the procedural posture of that case. There, the plaintiff indeed did not have a protestable decision that could have given rise to jurisdiction under section 1581(a) because, unlike Swisher, it had not filed a refund request. Thus, there was no Customs decision at all. Having rejected the government's argument that Customs' mere acceptance of the HMT was itself a protestable decision, we thus found jurisdiction in *U.S. Shoe* was appropriate under section 1581(i) because it could not have been proper under any other subsection. Our holding in *U.S. Shoe* thus does not dictate only one possible procedure for challenging the export HMT. Our holding in *U.S. Shoe* was merely that, given the procedural posture of that case, section 1581(i) residual jurisdiction was the appropriate jurisdictional basis. Thus, *U.S. Shoe* does not limit Swisher, or other challengers to the HMT, to section 1581(i) jurisdiction and its attendant two-year statute of limitations.

II.

Having held that Swisher may assert a jurisdictional basis different from that found applicable to the *U.S. Shoe* plaintiff, we must now decide if a protestable decision arose from Customs' denial of Swisher's request for a refund of the HMT.

Swisher's theory of protestability asserts that Customs' denial of its refund request was a decision "as to the amount of duties chargeable" or "as to a charge or exaction . . . within the jurisdiction of the Secretary of the Treasury," as specified in 19 U.S.C. §§ 1514(a)(2) and (3), the statute that provides for protests of final Customs decisions. The government, however, once again attempts to use *U.S. Shoe* to block Swisher, arguing that a request for a refund cannot be a protestable decision because the protest statute only covers final decisions of Customs. The decision on the refund could not be a final decision, the government argues, because the decision in *U.S. Shoe* precludes a finding that a request for refund is a mandatory procedure. The Court of International Trade reasoned, and the government now argues, that non-mandatory procedures cannot result in a final decision, and therefore protestable decision of Customs. We find this argument unpersuasive.

There is nothing in the regulation indicating that the filing of an HMT refund request is voluntary. Nor does the regulation in any way indicate that a taxpayer might proceed directly from payment to filing suit, under the 19 U.S.C. § 1581(i) residual jurisdiction of the Court of International Trade, to seek a refund of the

HMT. Indeed, the regulation merely says that refund requests should be made on Customs Form 350. The regulation does not distinguish among types of refunds that may be requested using the procedure, nor does it direct taxpayers to file, as an alternative, in the Court of International Trade.

Furthermore, the *U.S. Shoe* decision by this court did not directly address whether HMT refund requests pursuant to 19 C.F.R. § 24.24(e)(5) were voluntary. The *U.S. Shoe* plaintiff had not filed a refund request and neither party in that case argued that a refund request should have been filed. The *U.S. Shoe* decision merely held that collection of the HMT is not a protestable Customs decision. In addition, the Court of International Trade decision in *U.S. Shoe* mentioned in dicta that Customs decisions as to the administration of the tax (but not its constitutionality) were protestable decisions. *See U.S. Shoe*, 907 F. Supp. at 421. Thus, neither of those decisions supports the argument now forwarded by the government that denial of any refund requests is not a protestable decision.

In addition to requiring a tortured reading of our case law and the Customs regulation, the government's proposed interpretation would, in effect, require any HMT taxpayer who discovered an error entitling it to a refund to file a suit with the Court of International Trade within two years of collection of the HMT or risk losing the refund. Whether such a taxpayer had filed the "voluntary" refund request would be irrelevant to the statute of limitations. Any taxpayer following the instructions in the regulation and first filing a refund request would risk losing its cause of action if the processing of the refund request took more than two

years. The government's argument that the protest procedures are voluntary would render the refund portion of the regulation superfluous. We are not willing to make such an interpretation of the HMT regulations. In any event, as discussed *infra*, binding precedent of our predecessor court holds that denial of a request for a refund of deposited duties on imports is a protestable decision. *See Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944). We see no reason to treat the HMT refund requests as a "voluntary procedure" merely because the HMT is imposed, in this case, on exports.[5]

In addition, the government asserts that the protest statute only covers decisions "as to a charge or exaction." The denial of a refund request, the government asserts, is not a decision as to a charge or exaction. Further, the government argues, if the statute was intended to apply to *refusals* to grant refunds on charges or exactions, it would explicitly say as much, for the statute does explicitly state that "refusals to pay a claim for drawback" and "refusals to reliquidate an entry" are protestable decisions. *See* 19 U.S.C. § 1514(a)(6) & (7). Thus, the government argues, while the decision to *accept* that payment might have been considered a "decision as to a charge or extraction" [*sic*] before *U.S. Shoe*, the decision to *deny a refund* of such charge or exaction may not. The government then argues—again using *U.S. Shoe*—that the decisions in *U.S. Shoe* preclude a finding that Customs' mere

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[5] The Court of International Trade has held that payment of the HMT on imports merges into liquidation and thus is a protestable decision. *See Thomson Consumer Elec. Inc. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999).

acceptance of the tax payments is a protestable decision. We cannot agree with such an interpretation of the statute and our case law.

We are given no reason to strain to exclude a decision as to a refund of a charge or exaction from the definition of a "decision as to a charge or exaction." Indeed a precedential decision by our predecessor court, the Court of Customs and Patent Appeals, explicitly holds that the denial of a request for a refund is indeed a protestable decision. *See Eurasia Import*, 31 C.C.P.A. at 211-12. Addressing whether an earlier version of 19 U.S.C. § 1514(a)[6] authorized a protest of a refund denial, that court held:

> There is, of course, no express provision authorizing a protest against the collector's refusal to refund excessive duties . . . such as is provided, for example, in the case of the collector's refusal "to pay any claim for drawback." That it is the duty of the collector to make such refunds, however, is so well understood that no citation of statutory provisions concerning it and judicial decisions based thereon is necessary. . . . It seems to us that *a refusal to make refund of excessive duties is a negative decision, or finding which amounts to an exaction quite as much as a refusal to pay a claim* for drawback and we see no reason why section 514 . . . should be so narrowly construed with respect to the jurisdiction of the courts . . . as to deprive them of jurisdiction of a protest against such refund.

Id. at 211-12 (emphasis added).

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[6] The relevant language of section 514 of the Tariff Act of 1930 and 19 U.S.C. § 1514(a) is virtually identical.

Furthermore, the case law relied on by the government is neither apposite nor binding on this court. The government cites *Alberta Gas Chemicals, Inc . v. Blumenthal*, 82 Cust. Ct. 77, 467 F. Supp. 1245, 1249-50 (Cust. Ct. 1979), and a case quoting it, as holding that a charge or exaction is limited to "actual assessments of specific sums of money." But this is mere dicta. In *Alberta Gas*, the court was addressing an argument that an agency decision to begin an anti-dumping investigation was a decision as to a charge or exaction. Viewed in that context, we do not read the Customs Court's statement to exclude a decision about a requested refund from the sphere of "actual assessments of specific sums of money." In any event, unlike decisions of our predecessor courts, decisions of the predecessor to the Court of International Trade, a trial court, do not bind us. To the extent *Alberta Gas* can be construed as the government suggests, we reject it.

In further support of its holding that the denial of Swisher's refund request was not a protestable decision, the Court of International Trade said that it would be "incongruous" to allow a plaintiff to convert the "no decision" of HMT payment acceptance into a protestable decision merely by filing a refund request. Likewise, the government argues that Swisher's theory "eviscerates any statute of limitations" by allowing the plaintiff to control both the existence of a protestable decision and the timing of the decision. The Court of International Trade opinion cites our decision in *United States v. Cocoa Berkau, Inc.*, which declares that a court cannot interpret the accrual of a right of action in such a way that it "permits a single party to postpone unilaterally and indefinitely the running of the statute of limitations." 990 F.2d 610, 614 (Fed. Cir.

1993) (quotations omitted). Swisher responds that the governing HMT regulation has no time limit on requests for refunds or corrections of underpayments or overpayments based on clerical errors or other mistakes in calculating the HMT owed. Thus, Swisher argues, a regulatory failure to impose a period of limitations on refund requests should not preclude a finding that denial of a request for a refund is a protestable decision.

While we agree with the principle of *Cocoa Berkau* that courts should be cautious not to deprive one party of the repose intended by a statute of limitations by allowing another party to accrue a cause of action at will, that is not the situation in this case. Swisher did not sleep on its constitutional claims only to file the refund requests after a long delay. Rather, Swisher promptly filed its request for a refund in 1994, at the same time that many other exporters began to question the constitutionality of the HMT as it applied to exports. Thus, the filing by Swisher in 1994 for refund of payments going back to 1990 is comparable to that of an exporter who discovered four years after the fact that it had overpaid its HMT because of a calculation error.

By leaving the time for filing refund requests open, the regulation seems to contemplate that an HMT taxpayer might discover overpayments and request refunds of those overpayments many years after the payments were made. Likewise, the regulation appears to allows Customs to audit all of a taxpayer's HMT payments anytime within five years of calculation of the

payment. *See* 19 C.F.R. § 24.24(g)(1999).[7] Indeed, in a case recently before this court, *Princess Cruises v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), in 1991 Customs began an audit of the cruise line's HMT payments dating back to 1987. Thus, neither the government nor the taxpayer is barred by a two-year statute of limitations from initiating actions involving adjustments to HMT payments. Allowing a taxpayer a similar amount of time to seek a refund of a tax, on the ground that rather than miscalculated, it is altogether unlawful, is not, in our view, "incongruous." That Customs, by intent or in error, promulgated a regulation that does not provide a time limit for filing refund requests does not warrant our creating a limitation period by the expedient of deeming refund requests not protestable. Analogous procedures for refund of import duties have statutorily imposed time limits; however, there does not appear to be a generic limitation period on requesting refunds generally.[8] Customs was free to

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[7] The regulation requires that HMT taxpayers maintain all documents for Customs inspection for five years from the time of calculation. 19 C.F.R. § 24.24(g). The regulation, however, does not explicitly prohibit the government from auditing HMT payments after five years.

[8] In fact, it is not at all clear that refunds on import duties, which comprise the vast majority of the money collected by Customs, would or could be requested outside of the bounds of the liquidation or reliquidation procedures. With regard to imports, most fees, including the HMT, are collected at liquidation. Any fee collected at liquidation is considered merged with the liquidation. *See Thomson Consumer Elec., Inc. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999). A legal challenge to a liquidation decision must be made as a protest within 90 days of liquidation. *See Mattel Inc. v. United States*, 72 Cust. Ct. 257, 377 F. Supp. 955, 960 (Cust. Ct. 1974); 19 U.S.C. § 1514(c)(3)(A). A challenge based on a clerical error, or other factual mistake must be raised within

impose time limits on the filing of HMT refund requests just as the statutes impose time limits on reliquidation requests, and it remains free to alter the regulation to impose a time limit in the future. This court, however, will not impose a time limit on refund requests by holding, without basis, that such requests are not protestable.

Allowing exporters to seek refunds of all HMT paid since 1987 also avoids a fundamental unfairness to those exporters who did not have the resources to mount test litigation in the district court or the Court of International Trade on the constitutionality of the export HMT. In contrast, if we were to hold that a request for refund was not a protestable decision, Swisher, and others, would be limited to recovering only that HMT paid within two years before filing suit in the Court of International Trade. Given that the constitutionality of the HMT was not seriously questioned until 1994 and not completely resolved until 1998, such a holding would bar recovery of much of the unconstitutional HMT paid by exporters between 1987 and 1998. Indeed, some exporters with limited legal resources might be completely barred from recovering their payments of the unconstitutional tax. Erroneous overpayments during the same period due to miscalculations, however, would be recoverable even if the miscalculation was not discovered until today. We decline to create such an anomalous situation, although the government so urges. Finding no reason to believe that a request for refund, based on a clerical error, is

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one year of liquidation in a request of reliquidation. *See* 19 U.S.C. § 1520(c). Denial of a request for reliquidation under section 1520(c) is a protestable decision. *See* 19 U.S.C. § 1514(a)(7).

not a protestable decision (and thus not time barred after two years from collection), we see no reason to treat differently requests based on constitutional error.

Accordingly, we hold that the denial of a request for refund is a protestable decision and thus can accrue a claim based on the alleged illegality of the exaction of the HMT even if the request, which under the HMT regulation can be filed at any time, is made after the two-year statute of limitations has run on suing over the act of payment of the tax. Hence, Swisher's cause of action accrues at the time of the denial of the protest following the denial of the refund request, and the 180-day period of limitations for filing with the Court of International Trade runs only from that date.[9]

CONCLUSION

The summary judgment of the Court of International Trade dismissing Swisher's refund claims is therefore

REVERSED and the case is REMANDED.

COSTS

Each party to pay its own costs.

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[9] Suits filed following the denial of a protest must be filed with the Court of International Trade within 180 days after the denial of the protest. 19 C.F.R. § 174.31 (1999). Swisher's protest was denied as a matter of law on March 26, 1995 and as it filed suit in the Court of International Trade on March 29, 1995, its suit was timely filed.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 98-153
Court No. 95-03-00322

SWISHER INTERNATIONAL, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Nov. 6, 1998]

OPINION

RESTANI, Judge:

This action seeking recovery of Harbor Maintenance Taxes (HMT) pursuant to 28 U.S.C. § 1581(a) (1994) (jurisdiction over denial of protest by Customs Service) is before the court on cross motions for summary judgment.

Facts

Swisher International, Inc. paid HMT on a quarterly basis from the fourth quarter of 1990 through the second quarter of 1994. Swisher filed refund requests on Customs Form 350 on the basis that the statute

imposing HMT on exports is unconstitutional. The refund requests were denied on October 26, 1994. On November 21, 1994 Customs promulgated specific procedures for filing protests challenging the constitutionality of HMT on exports. *See User Fee Protests*, 59 Fed. Reg. 60044 (Dep't Treasury 1994). On November 23, 1994 Swisher protested the denial in the manner instructed by Customs. Swisher requested an accelerated disposition of the protest under 19 U.S.C. § 1515(b) (1994) on February 24, 1995. Swisher then filed this action on March 29, 1995, which was three days after the protest would have been denied by operation of law, *see* 19 U.S.C. § 1515(b), if the protest had been one of the protestable decisions listed in 19 U.S.C. § 1514(a) (1994).

The HMT statute was declared unconstitutional as applied to foreign exports, as are at issue here. *U.S. v. U.S. Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed.2d 453 (1998). In *U.S. Shoe*, the Supreme Court found that jurisdiction lay under 28 U.S.C. § 1581(i) (1994).[1] *Id.* at 1293-94. The applicable statute of

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[1] Section 1581(i) of Title 28 provides in relevant part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

limitation is 28 U.S.C. § 2636(i) (1994),[2] which permits suit to be commenced within two years of payment of the tax. *See Stone Container Corp. v. United States*, Slip Op. 98-143, No. 96-10-02366, 1998 WL 800017 (Ct. Int'l Trade Oct. 5, 1998). Thus, some of plaintiff's claims will be timed barred unless jurisdiction is also cognizable under 28 U.S.C. § 1581(a).

Swisher participated as an *amicus curiae* before both this court and the Court of Appeals for the Federal Circuit, raising its refund protest denial theory, but as it was not a party it could not obtain a definitive disposition of its theory.[3] The court addresses it now.

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(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[2] Section 2636 of Title 28 provides in relevant part:

Time for commencement of action

* * *

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

[3] *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997) (finding jurisdiction under 28 U.S.C. § 1581(i), and not § 1581(a), and leaving open issue of whether a protest U.S. Shoe might have filed would have altered this finding).

Discussion

The Supreme Court recognized jurisdiction over suits to recover HMT on exports as lying under 28 U.S.C. § 1581(i), the residual jurisdiction of the court. *U.S. Shoe*, 118 S.Ct. at 1293-94. Section 1581(i) applies if none of the other sections of 28 U.S.C. § 1581 are available for relief. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied* 484 U.S. 1041, 108 S. Ct. 773, 98 L.Ed.2d 859 (1988) (citing cases). This means that if one had the opportunity for access to the court under 28 U.S.C. § 1581(a),[4] albeit after exhausting mandatory administrative remedies, there is no § 1581(i) jurisdiction. *Lowa, Ltd. v. United States*, 5 CIT 81, 88, 561 F. Supp. 441, 446-47 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984).

Of course, it is possible that there is an exception to the long line of case law on this point because of the uniqueness of a suit based on exports, as opposed to imports, the normal subject matter of the court. The court finds this not to be the case. In fact, it is this uniqueness which reinforces the applicability of the standard jurisprudence. Section 1581(i) provides jurisdiction because recovery of HMT on the basis of the statute's unconstitutionality cannot be shoe-horned into Customs' protest procedures. What may be protested is a decision of Customs falling within the categories set

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[4] Section 1581(a) of Title 28 provides:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

forth in 19 U.S.C. § 1514(a).[5] Swisher alleges that Customs' "decision" to deny its refund request was a

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[5] Section 1514(a) of Title 19 provides in relevant part:

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed in section 2636 of that title.

decision regarding the "amount of duties chargeable" or a "charge or exaction."

First, and most importantly, *U.S. Shoe*, 118 S. Ct. at 1293-94, makes clear that there is no protestable Customs decision with respect to the constitutionality of HMT. It would be incongruous to permit conversion of "no decision" into a protestable decision, by means of the unilateral choice of the exporter to seek a refund at any time of its choosing. There are no time limits for the request or for the Customs decision thereon under 19 C.F.R. § 24.24(e)(5) (1997), which provides for HMT refund requests. Interpretation of the law to put control of the setting of limitations periods in the hands of one party to the dispute is disfavored. *United States v. Cocoa Berkau Inc.*, 990 F.2d 610, 614 (Fed. Cir. 1993) ("we cannot 'permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations'.") (quoting *United States v. Commodities Export Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992)).

Second, it is clear that no liquidation is involved. At most, plaintiff analogizes the denial of the refund request to a liquidation, but it is not a liquidation as that term is understood—the final determination of import duties. *See* 19 C.F.R. § 159.1 (1998) ("liquidation means the final computation or ascertainment of the duties or drawback accruing on an entry."). It is a liquidation which settles "the amount of duties owing." It is also "charges or exactions" that merge into liquidation which are protestable. *United States v. Utex International, Inc.*, 857 F.2d 1408, 1414 (Fed. Cir. 1988) ("[19 U.S.C. § 1514 and 28 U.S.C. § 2637] relate to the exhaustion of administrative remedies with respect to liquidation of the entry, as a prerequisite to judicial

review of any of the items subsumed in liquidation."). *See also United States v. Ataka America, Inc.*, 17 CIT 598, 606, 826 F. Supp. 495, 502 (1993) (customs action merging into liquidation, "must be protested to avoid finality"). *Utex* and *Ataka* are fully consistent with the traditional definition of charge or exactions as "specific sums of money (other than ordinary customs duties) on *imported* merchandise." *Alberta Gas Chemicals, Inc. v. Blumenthal*, 82 Cust. Ct. 77, 82, 467 F. Supp. 1245, 1249-50 (1979) (emphasis added). *Utex* and *Ataka* are also reconcilable with *Norfolk & Western Railway v. United States*, 18 CIT 55, 843 F. Supp. 728 (1994), *aff'd*, 62 F.3d 1395 (Fed. Cir. 1995) (user fee on vehicles and vessels protestable), as the fees in *Norfolk* were intimately connected to importation. *General Motors Corp. v. United States*, 10 CIT 569, 643 F. Supp. 1139 (1986) is similar and protestability was a more central issue in that case. *See also Carlingswitch, Inc. v. United States*, 68 C.C.P.A. 49, 55, 651 F.2d 768, 773 (1981) ("refusals to refund money" are not 19 U.S.C. § 1514 "charges or exactions.") Thus, it appears there is nothing which may be protested as a prerequisite to 28 U.S.C. § 1581(a) jurisdiction in this case.

Further, while Customs may provide refund and "protest" procedures for the convenience of the parties, if such administrative procedures are not mandatory, they will not toll the statute of limitations. *See Cocoa Berkau*, 990 F.2d at 615-16 (28 U.S.C. § 2415(a) not tolled by permissive administrative proceeding); *Ataka America, Inc.*, 17 CIT at 605, 826 F. Supp. 495, 501-02 (same). Because administrative procedures have been found not to be mandatory as to challenges to the unconstitutionality of HMT on exports, *see U.S. Shoe*, 118 S.Ct. at 1293, they do not toll the statute. As indicated

in the discussion of liquidation, *supra*, even as to questions of interpretation of the HMT statute itself or with regard to factual questions as to HMT on exports, 28 U.S.C. § 1581(a) protest denial jurisdiction is in doubt.

Plaintiff, however, relies heavily on Customs' alleged authority to issue protestable refund decisions under 19 C.F.R. § 24.24(e)(5) (1997), and to case law finding protest necessary for the full array of legal issues arising out of a refund denial.[6] While Customs may have the authority to make decisions with regard to HMT amount, as opposed to the constitutionality of the statute, as indicated it is not at all clear that the mandatory protest procedures of 19 U.S.C. § 1514(a) apply to even such limited decisions, where exports are involved. It may be that for such cases 28 U.S.C. § 1581(i) is the applicable jurisdictional provision. The remedy under 19 C.F.R. § 24.24(e)(5) may be read as the type of remedy which should be exhausted if Customs may make a meaningful, that is, non-futile decision. *See* 28 U.S.C. § 2637(d) (1994) (court has discretion to require exhaustion in various cases including those brought under 28 U.S.C. § 1581(i)). It may be, however, that there is no regulatory time limit pre-

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[6] The court does not take issue with the proposition that protests of 19 U.S.C. § 1514(a) decisions as to imports may raise constitutional issues. *See C.J. Tower & Sons of Buffalo, Inc. v. United States*, 34 Cust. Ct. 95, 34 Cust. Ct. 95, 135 F. Supp. 874 (1955) (reviewing protest involving Fifth Amendment challenge to tariff); *Star-Kist Foods, Inc. v. United States*, 47 C.C.P.A. 52, 275 F.2d 472 (1959) (reviewing protest allegation that duty arose under unconstitutional statute). Nonetheless, *U.S. Shoe* made clear that this procedure is not mandated as to constitutional challenges to HMT on *exports*.

cisely because the time limit is necessarily dictated by the statute of limitation applicable to 28 U.S.C. § 1581(i). In such a case the statute would continue to run until suit is filed. Thus, if a party which paid HMT on exports seeks a refund because of an ordinary dispute within Customs' jurisdiction, it should promptly request one from Customs. It has not been determined, however, that such a request will toll the statute.[7]

Defendant opined at oral argument that the refunds referred to in 19 C.F.R. § 24.24(e)(5) are those described in 19 U.S.C. § 1520(c) (1994) and that refunds under that provision may be made for errors of fact only. Generally, Customs makes refunds of monies erroneously collected pursuant to 19 U.S.C. § 1520. Section 1520(c), which allows correction within one year of liquidation, is limited to factual error, but not all of 19 U.S.C. § 1520(a) is so limited. Subsections 1520(a)(1) and (a)(2) of Title 19 are potentially applicable.[8] Subsection (1), however, refers to liquidation of entries and subsection (2) refers to fees, charges, or exactions, but

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[7] *Dicta* in *U.S. Shoe*, 19 CIT 1284, 1296, 907 F. Supp. 408, 418 (1995), *aff'd*, 114 F.3d 1564 (Fed.Cir.1997), *aff'd*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998), might be read to state that such limited decisions as to exports are protestable in the sense of 19 U.S.C. § 1514 and that jurisdiction would lie under 28 U.S.C. § 1581(a) for such decisions. That precise issue was not before the court. The concurring opinion indicates that the lack of time limits for decision making by Customs on refund requests under 19 C.F.R. § 24.24(e)(5) supports the view that this is not a mandatory procedure for purposes of 19 U.S.C. § 1514(a) and, thus, 28 U.S.C. § 1581(a) jurisdiction is lacking. *U.S. Shoe*, 19 CIT at 1302, 907 F. Supp. at 423 (Musgrave, J., concurring).

[8] The other subsections of 19 U.S.C. § 1520(a) cover fines and penalties, (a)(3), and clerical errors, (a)(4).

excludes taxes. Thus, it appears that 19 U.S.C. § 1520 does not apply to export tax refunds.[9] Even if 19 U.S.C. § 1520(a) could be read to apply to export taxes in some circumstances, it cannot be read to allow Customs to refund taxes owed under the terms of a statute, as these taxes were owed at the time the refund was requested. Customs could not refund the taxes because Customs could not declare the statute unconstitutional. Any refund procedures arguably permissible under 19 U.S.C. § 1520 did not apply to these attempts to recover HMT payments. Thus, assuming *arguendo* that decisions as to HMT on exports may be protestable decisions as to "amount of duties," "charges" or "exactions," and thus 28 U.S.C. § 1581(a) protest denial jurisdiction might be applicable in some HMT export situations, it is not applicable to this dispute over the constitutionality of the HMT statute.

In conclusion, the court finds whether or not some decisions with regard to HMT on exports are protestable within the meaning of 19 U.S.C. § 1514(a), there was no protestable decision giving rise to 28 U.S.C. § 1581(a) jurisdiction in this case. Furthermore, a plaintiff cannot unilaterally grant itself a new limitations period by making a refund request whenever it so chooses.

Plaintiff shall present an appropriate judgment sheet reflecting this opinion within twenty days hereof.

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[9] Plaintiff agrees that 19 U.S.C. § 1520 does not apply, but rather argues that 19 C.F.R. § 24.24(e) provides all the refund authority needed. As explained *supra* in the text, the regulatory provision is insufficient to form a basis for jurisdiction in this action.

Supreme Court, U.S.
FILED
OCT 27 2000

(2)

No. 00-415

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

SWISHER INTERNATIONAL, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
JOSEPH F. DENNIN
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Respondent

38 pp

QUESTION PRESENTED

Whether a taxpayer that exhausts its administrative remedies by following the refund procedure specified in the Harbor Maintenance Tax regulations of the Customs Service, and timely protests the denial of the requested refund, is entitled to judicial review of Customs' decision under the "protest" jurisdiction of the Court of International Trade, 28 U.S.C. § 1581(a).

RULE 29.6 DISCLOSURE

Respondent Swisher International, Inc. has no parent corporation nor any publicly held company owning 10% or more of its stock, and has no subsidiaries or affiliates that have issued shares to the public.

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This case concerns the administrative details of the refunds of Harbor Maintenance Tax ("HMT") required by the Court's recent decision in *United States v. United States Shoe Corporation*, 523 U.S. 360 (1998), which held the tax on exports to be unconstitutional. The government asks the Court to review which subsection of 28 U.S.C. § 1581 confers jurisdiction on the Court of International Trade ("CIT") to award refunds under the specific fact pattern presented in this case. In *U.S. Shoe*, the government excluded similar jurisdictional issues from the scope of its petition for certiorari, on the ground that they were too insignificant to warrant this Court's review. The government expressly stated in that petition that the jurisdictional basis for awarding HMT refunds was an issue "peculiar to the refund requests of exporters under the Harbor Maintenance Tax" that "lacks recurring application in other contexts." Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. Nevertheless, evidently concerned about the magnitude of the refunds now required to implement the constitutional ruling of *U.S. Shoe*, the government seeks review of equally narrow, fact-bound issues here.

The government's statements in its *U.S. Shoe* petition concerning the narrowness of jurisdictional issues under the HMT were correct, and its inconsistent claims here are erroneous. The exclusive jurisdiction of the CIT and the Federal Circuit over challenges to the HMT ensures that no conflict among the circuits can arise. Moreover, the jurisdictional basis for a finite number of lawsuits, seeking refunds of a tax that is no longer being collected, is not an issue of recurring importance in customs law, much less in other contexts. The decision below is also perfectly consistent with *U.S. Shoe*; the difference in jurisdictional bases between that case and this one is not a conflict, but instead simply stems from the fact that Respondent Swisher International, Inc. exhausted its administrative remedies, whereas the exporter in *U.S. Shoe* did not. Review by this Court therefore is not warranted.

REGULATORY PROVISION INVOLVED

In addition to the statutory provisions set forth in the government's petition, this case involves the regulation that previously governed collection and refund of the Harbor Maintenance Tax on exports.[1] 19 C.F.R. § 24.24 (1998) provided in relevant part:

> (e) *Collections*
>
> * * *
>
> (2) *Export vessel movements*—(i) *Time and place of liability.* Subject to the exemptions and special rules of this section, when cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation. The SED or equivalent documentation is to be completed and submitted in accordance with the procedures set forth in § 4.63 of this chapter and 15 CFR part 30.
>
> (ii) *Fee payment.* The exporter whose name appears on the SED or equivalent documentation shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service

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[1] The HMT regulation has been amended to remove the provision concerning the HMT on exports, 19 C.F.R. § 24.24(e)(2) (1998). *See* T.D. 98-64, 63 Fed. Reg. 40,822, 40,823 (1998). Citations in this brief are to the April 1, 1998 edition of the Code of Federal Regulations, which contained the version in effect at the time this action was filed.

for all fees for which he is liable for the quarter to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915. Accompanying the payment shall be either a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, or if the exporter files Automated Summary Monthly Shipper's Export Declarations with the Bureau of the Census in accordance with Foreign Trade Statistics Regulations (15 CFR 30.39), a cover letter identifying the exporter, his exporter identification number (EIN), Census Bureau reporting symbol and the quarter for which the payment is being made.

* * *

(5) *Refund and supplemental payment.*

Where a refund is requested or supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or supplemental payment is made.

(f) *Quarterly payments.* All quarterly payments required by this section must be received no later than 31 days after the close of the quarter being paid. Quarterly periods end on the last day of March, June, September, and December.

STATEMENT OF THE CASE

U.S. Shoe established the government's liability for return of unconstitutionally exacted HMT on exports. Respondent Swisher exhausted Customs' administrative remedies for HMT refunds before filing suit. However, with the goal of minimizing the amount of HMT it must refund, the government now seeks Supreme Court review to establish that its own administrative remedies were unavailable to Swisher. Proper understanding of this issue requires more detail than the government's petition provides as to the basis of the CIT's jurisdiction, the regulations established by Customs, and the overall history of the HMT litigation.

A. Court of International Trade Jurisdiction

The statute defining the CIT's jurisdiction to hear cases against the United States, 28 U.S.C. § 1581, creates a number of routes to judicial review of Customs Service actions. Subsections (a) and (i) of the statute are at issue here.

1. Protest Jurisdiction Under Section 1581(a)

The most common form of judicial review of a Customs Service decision occurs under the CIT's "protest" jurisdiction. The practice of requiring taxpayers to exhaust administrative remedies by protesting Customs Service decisions at the agency before seeking judicial review dates to the earliest days of the Republic.[2] Congress eventually codified this protest requirement, and provided a mechanism for judicial review of the Customs Service's decision on the protest.

In its current form, the protest statute provides that "decisions of the Customs Service, including the legality of all orders and findings entering into the same," as to a variety of

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[2] *See generally United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1552 (Fed. Cir. 1997) (discussing origin of the protest procedure).

enumerated matters will be considered "final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . ." 19 U.S.C. § 1514(a). The "decisions" subject to protest include decisions as to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* § 1514(a)(3). The taxpayer has ninety days from the date of the Customs Service decision to file such a protest. *Id.* § 1514(c)(3). If Customs denies the protest, the taxpayer may seek judicial review in the CIT, which has exclusive jurisdiction over such actions under its "protest" jurisdiction. 28 U.S.C. § 1581(a). The applicable statute of limitations requires filing suit within 180 days of the protest denial. *Id.* § 2636(a). The CIT's protest jurisdiction routinely has been invoked in cases challenging customs charges and exactions on constitutional grounds, both in the CIT and in its predecessor courts.[3]

2. Residual Jurisdiction Under Section 1581(i)

In addition to specific grants of jurisdiction over the matters detailed in sections 1581(a) through 1581(h), section 1581(i) also grants the CIT broad residual jurisdiction over actions arising under the statutes governing import transactions. *See* 28 U.S.C. § 1581(i). Such a lawsuit must be filed within two years of when "the cause of action first accrues."

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[3] *See, e.g., F.W. Myers & Co. v. United States*, 615 F. Supp. 569, 570 (Ct. Int'l Trade 1985) (invoking section 1581(a) jurisdiction in case raising constitutional issue through timely protest); *Erie Navigation Co. v. United States*, 475 F. Supp. 160 (Cust. Ct. 1979) (Fifth Amendment challenge to vessel repair duty statute); *Tuscany Fabrics, Inc. v. United States*, 317 F. Supp. 741 (Cust. Ct. 1970) (Fifth Amendment challenge to tariff statute), *aff'd*, 454 F.2d 1188 (C.C.P.A. 1972).

28 U.S.C. § 2636(i). Congress did not intend this residual jurisdiction, which was first created in 1980, to encompass causes of action that were the traditional and exclusive province of protest jurisdiction, nor did Congress intend to create new causes of action under section 1581(i). Instead, section 1581(i) was intended to confirm CIT jurisdiction over a class of cases arising out of import transactions and involving the international trade laws, which plaintiffs had erroneously been commencing in the district courts.[4] The Federal Circuit has held that because of its residual character, section 1581(i) generally may not be invoked when one of the more specific jurisdictional provisions (*i.e.*, sections 1581(a) through 1581(h)) applies.[5]

B. The *U.S. Shoe* Litigation

The CIT designated *U.S. Shoe* as a test case on the constitutionality of the HMT on exports, staying this action and the other pending challenges in the CIT.[6] The government and the taxpayer in *U.S. Shoe* agreed that the CIT, rather than some other court, was the proper forum to hear challenges to the HMT. However, they disagreed sharply as to the basis of the CIT's jurisdiction. The government argued that the CIT had jurisdiction only under section 1581(a), and only to the extent that the exporter had properly protested its payment.

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[4] *See United States v. Bar Bea Truck Leasing Co.*, 713 F.2d 1563, 1566 (Fed. Cir. 1983) (quoting H.R. Rep. No. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758).

[5] *Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987).

[6] *See United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade 288 (1995). Similar challenges were filed in two other courts—the CIT and the Court of Federal Claims. *See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1567 n.2 (Fed. Cir. 1997) (noting pendency of one district court action as well as numerous CIT and Court of Federal Claims cases).

See United States Shoe Corp. v. United States, 907 F. Supp. 408, 418 (Ct. Int'l Trade 1995). The protestable "decision," the government argued, was "Customs' decision to accept payment" of HMT. *Id.* Under the government's theory, if the exporter did not file a protest within ninety days of the *payment* of the tax, it would be barred from ever recouping that payment, because it would have missed the deadline for a protest set forth in 19 U.S.C. § 1514(a). The *U.S. Shoe* taxpayer, by contrast, argued for jurisdiction under section 1581(i), under which no protest was required. The statute of limitations applicable to actions under section 1581(i) allowed recovery of tax paid within two years of filing the lawsuit. 28 U.S.C. § 2636(i).

A special three-judge panel of the CIT agreed with the parties that the CIT was the proper forum to adjudicate constitutional challenges to the HMT. 907 F. Supp. at 411. As for the basis of its jurisdiction, the CIT rejected the government's theory that receiving payment of HMT was an affirmative "decision" that could be protested and then reviewed in the CIT under section 1581(a). The court concluded that there was no Customs Service "decision" at all under the facts of *U.S. Shoe*. In the absence of a decision, there was nothing to protest, and hence there could be no jurisdiction under section 1581(a).[7] The CIT therefore held that its jurisdiction arose under section 1581(i). 907 F. Supp. at 419-21. The CIT also held that the HMT violated the Export Clause of the Constitution. *Id.* at 418. On appeal, a five-judge panel of the Federal Circuit affirmed the CIT's

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[7] As a protective measure, the taxpayer in *U.S. Shoe* had also filed a "protest" within ninety days of payment of the tax, in case the court accepted the government's jurisdictional theory. *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't, at 4 n.2, *U.S. Shoe*. Because there was no protestable "decision," this attempted "protest" was not valid.

holding that the HMT was unconstitutional, and that jurisdiction was proper under section 1581(i). *United States v. United States Shoe Corp.*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998).

In *U.S. Shoe*, the government petitioned for certiorari on the constitutional issue only, and expressly declined to seek review of the Federal Circuit's holding that jurisdiction arose under section 1581(i). Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. The jurisdictional issue, said the government, "has no relevance to the proper disposition of this case," and is "peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." *Id.* The Court granted certiorari only on the constitutional question, and the parties made only passing references to the CIT's jurisdiction in footnotes to their briefs.[8]

Before proceeding to affirm the Federal Circuit's decision on the constitutional issue, this Court briefly observed that "the CIT properly entertained jurisdiction in this case." *U.S. Shoe*, 523 U.S. at 365. The Court confirmed that the CIT has "exclusive jurisdiction over challenges to the HMT," and that "the Court of Federal Claims lacks jurisdiction over

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[8] *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't at 4 n.2, 34 n.44, *U.S. Shoe*. Although the parties did not dispute the CIT's jurisdiction over the case, a group of *amici curiae*, led by Arctic Cat, Inc., filed a brief in this Court challenging CIT jurisdiction. *See* Mot. and Br. of Arctic Cat, et al., as *Amicus Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*. However, the Arctic Cat *amici* did not discuss the differences between sections 1581(a) and 1581(i); rather, they raised the more fundamental question whether the CIT had jurisdiction *at all*. The Arctic Cat *amici* argued that exclusive jurisdiction to award HMT refunds lay in the Court of Federal Claims under the Tucker Act. *Id.* at 4. The parties briefly addressed Arctic Cat's argument regarding the Court of Federal Claims in their briefs. Br. for Resp't at 34 n.44, *U.S. Shoe*; Reply Br. at 18 n.8, *U.S. Shoe*.

the challenges to the HMT currently pending there." *Id.* at 366 n.3. The Court stated that because the Customs Service had issued no decision to the *U.S. Shoe* plaintiff, but " 'merely passively collect[ed]' HMT payments," no protest could have been filed. *Id.* at 365. Accordingly, jurisdiction did not arise under section 1581(a), but rather under section 1581(i). *Id.* at 366.

C. The Administrative Proceedings Below

The present case arose through a very different administrative process from that in the *U.S. Shoe* litigation. Rather than proceed directly to court, Respondent Swisher first exhausted its administrative remedies under the Customs Service regulations governing the refund of HMT. The remedies that Swisher pursued led first to a Customs Service decision denying requests for tax refunds, and then to Customs' denial of a protest regarding that decision. Swisher then filed suit, seeking judicial review of Customs' decision to deny the refunds.

Pursuant to the congressional authorization to establish appropriate administrative procedures to implement the HMT, 26 U.S.C. § 4462(i), the Customs Service created a procedure under which an exporter was liable for HMT at the time it loaded the cargo, but was not required to pay the HMT until the end of the quarter. 19 C.F.R. § 2424(e)(2). The procedures required submitting quarterly payments within 31 days of the close of the quarter, accompanied by a tax return. 19 C.F.R. § 24.24(e)(2), (f). The exporter could seek a refund of HMT by filing an amended tax return. 19 C.F.R. § 24.24(e)(5). Neither the HMT refund regulation nor the amended tax return form contained any time limit for requesting refunds of HMT on exports. *Id.*

Swisher paid HMT from the Fourth Quarter of 1990 through the Second Quarter of 1994. Pet. App. 4a. In September 1994—at approximately the same time United States

Shoe Corporation filed suit seeking recovery of HMT—Swisher instead exhausted its administrative remedies by filing a series of amended tax returns with Customs, requesting refunds for each quarter it had paid HMT. Pet App. 4a-5a.

Customs rendered a decision denying Swisher's refund requests on October 26, 1994. Pet. App. 5a. On November 23, 1994, Swisher filed a timely protest of the denial of its refund requests, pursuant to 19 U.S.C. § 1514. Pet. App. 6a. Swisher requested accelerated disposition of the protest pursuant to 19 U.S.C. § 1515(b). Pet. App. 6a. When Customs took no action on the protest within the next thirty days, the protest was deemed denied by operation of law on March 26, 1995. 19 U.S.C. § 1515(b); Pet. App. 6a. Swisher timely filed this action in the CIT several days later, invoking that court's section 1581(a) protest jurisdiction. Pet. App. 6a.

D. The Judicial Proceedings Below

The CIT rejected Swisher's jurisdictional arguments, and held that it had jurisdiction only under section 1581(i), which limited recovery to the two years preceding the filing of the lawsuit. Pet. App. 24a-33a. On appeal, a unanimous panel of the court of appeals reversed, holding that jurisdiction under the facts of this case properly lay under section 1581(a). Pet. App. 1a-23a.

The court of appeals confirmed that, consistent with fifty years of precedent, "a decision as to a refund of a charge or exaction" is a "decision as to a charge or exaction" subject to protest under 19 U.S.C. § 1514(a)(3). Pet. App. 17a-18a (citing *Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944)). Swisher's cause of action, the court held, accrued when the protest was denied; because Swisher filed suit within the 180-day limitations period, the CIT had "protest" jurisdiction under 28 U.S.C. § 1581(a). Pet. App. 23a.

The court of appeals rejected the government's argument

that *U.S. Shoe* dictated a different result. In an opinion by the same judge who wrote the Federal Circuit's opinion in *U.S. Shoe*, the court of appeals explained that its "holding in *U.S. Shoe* that there was no protestable decision was limited to the procedural posture of that case" and did not "dictate only one possible procedure for challenging the export HMT." Pet. App. 14a. Here, Swisher had "pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff":

> Neither our decision nor that of the Supreme Court, however, reached the question of whether section 1581(a) jurisdiction would have been available had a protest been filed and denied following the filing and denial of a refund request. Thus, *U.S. Shoe* does not preclude our consideration of section 1581(a) jurisdiction in this case where a refund request and protest were, in turn, filed and denied.

Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The government's petition fundamentally misperceives the significance of this case in relation to *U.S. Shoe*. The government argues that the decision below conflicts with *U.S. Shoe* because the court of appeals found a different basis for CIT jurisdiction in this case. In an opinion by the same judge who authored that court's decision in *U.S. Shoe*, the court of appeals correctly recognized that Swisher here invoked an administrative procedure that was never considered in *U.S. Shoe*, and that this exhaustion of administrative remedies gave rise to a different jurisdictional basis in the CIT. This case and *U.S. Shoe* do not conflict, nor do they create confusion as to CIT jurisdiction. Rather, taken together they simply illustrate the unremarkable proposition that different administrative procedures may provide different bases for jurisdiction in the CIT.

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *U.S. SHOE*

In the litigation over export HMT, three distinct approaches to CIT jurisdiction have emerged, only two of which were litigated by the parties in *U.S. Shoe*. In *U.S. Shoe*, the exporter challenged the government's collection of HMT by filing a suit for refund in the CIT, invoking the court's jurisdiction under section 1581(i) to claim a refund of tax collected within two years of the date of filing suit. The government argued instead in the lower courts that the exporter must protest the Customs Service's alleged "decision" to accept payment of the tax within ninety days of the payment, and then file suit under the CIT's section 1581(a) protest jurisdiction. The lower courts rejected the government's untenable theory on the ground that no Customs "decision" was involved in passively accepting payment, and the government wisely abandoned the theory in this Court. In its *U.S. Shoe* opinion, this Court confirmed that mere acceptance of the tax was not a "decision" that could lead to CIT

jurisdiction under section 1581(a). 523 U.S. at 365.

Although the court below held that the CIT had jurisdiction over this case under section 1581(a), the basis for that holding is completely different from the government's section 1581(a) theory rejected in *U.S. Shoe*. Following a Customs Service regulation that was not invoked in *U.S. Shoe*, Swisher filed requests for refunds of HMT; when the Customs Service issued a decision denying these requests, Swisher protested the decision. When Customs denied the protest, Swisher filed suit challenging that denial in the CIT. The determination that Customs had issued no decision *at all* in *U.S. Shoe*, and therefore that protest jurisdiction was not available under the facts of that case, has no bearing on this case, in which Swisher exhausted its administrative remedies under Customs Service regulations and protested a specific Customs decision. The exporter in *U.S. Shoe* challenged the passive *collection* of HMT, whereas Swisher here challenged a specific, affirmative Customs Service *decision*. Under the CIT's jurisdictional statute, these different administrative routes led to different bases for jurisdiction.

A. The Jurisdictional Question Presented In This Case Was Neither Briefed Nor Argued To This Court In *U.S. Shoe*

A central contention of the government's petition is that the Court has already considered and rejected Swisher's jurisdictional arguments in *U.S. Shoe*, and therefore that the court of appeals erred in accepting those arguments. In fact, Swisher's jurisdictional arguments were never even presented to this Court, much less rejected by it.

1. The government expressly declined to seek certiorari on the question of jurisdiction in *U.S. Shoe*, on the ground that it was an question "peculiar to the refund requests of ex-

porters under the Harbor Maintenance Tax" that "lacks recurring application in other contexts."[9] Accordingly, the Court granted certiorari only on the question of the constitutionality of the HMT; jurisdictional issues were not included in the question presented. 523 U.S. at 365.

2. In the *U.S. Shoe* proceedings in this Court, neither the parties nor any of the numerous *amici curiae* briefed the jurisdictional question presented in this case, although the government inexplicably asserts otherwise. Pet. 18-19 n.8. Accordingly, the *U.S. Shoe* briefs did not even mention requests for refunds under the HMT regulation or the protest of a decision denying such requests.[10] One of the thirteen *amicus* briefs filed in the case did argue that the CIT did not have jurisdiction *at all*, and that HMT challenges could be brought only in the Court of Federal Claims, but that brief did not argue the distinction between section 1581(a) and section 1581(i). The *U.S. Shoe* parties tersely refuted the Court of Federal Claims argument, noting that the government had not sought review of the determination that CIT jurisdiction arose under section 1581(i) rather than 1581(a).[11]

Not surprisingly, the jurisdictional question presented here was not addressed at oral argument in *U.S. Shoe*. Neither were the jurisdictional arguments pursued by the parties below in that case. The sole reference to jurisdiction concerned whether cases pending in the Court of Federal Claims

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[9] Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*.

[10] Indeed, the parties and the *amici* did not even brief the two jurisdictional arguments considered by the lower courts in *U.S. Shoe*. The parties only referred to their prior positions in footnotes. *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't at 4 n.2, 34 n.44, *U.S. Shoe*.

[11] *See* Mot. and Br. of Arctic Cat, et al., as *Amici Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*; Br. for Resp't at 34 n. 44, *U.S. Shoe*; Reply Br. at 18 n.8, *U.S. Shoe*.

could be transferred to the CIT. *U.S. Shoe*, Transcript, 1998 WL 102578 at *32-33 (Mar. 4, 1998).

3. In its *U.S. Shoe* opinion, the Court did not address the jurisdictional question presented in this case. The petition nonetheless claims that "the arguments submitted by respondent were fully briefed and considered" in *U.S. Shoe*. Pet. 18-19 n.8. As noted above, the government's assertion regarding briefing is simply wrong. In addition, the citations provided in the government's petition show only that this Court considered and rejected *the government's* jurisdictional theory in *U.S. Shoe* (which assumed that collection of a tax represents a "decision"), not that it considered Swisher's completely different argument (which is premised upon exhaustion of administrative remedies). *See* Pet. 18-19 n.8 (citing 523 U.S. at 365-66).

4. The petition also inexplicably and erroneously claims that both the CIT and the Federal Circuit "rejected respondent's contentions" in *U.S. Shoe*. Pet. 15 n.5. In fact, although Swisher participated as an *amicus curiae* before both courts in *U.S. Shoe*, only the CIT (in *dicta*) reached the question presented here; the Federal Circuit's *U.S. Shoe* decision did not mention the question.[12] The citations to the

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[12] In a single paragraph of *dicta*, the CIT briefly rejected the argument of "certain *amici* [who] contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction," stating that "Customs does not have the power to decide the constitutionality of the Tax," and therefore that "protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality." *U.S. Shoe*, 907 F. Supp. at 421. The CIT cited no authority for this proposition, which contradicts the familiar principle of exhaustion doctrine that even constitutional issues normally can (or must) be presented first to an

(Footnote cont'd on next page)

Federal Circuit's opinion in the government's petition again relate only to the government's jurisdictional theory, not Swisher's. *See* Pet. 18-19 n.8 (citing 114 F.3d at 1568-70). Accordingly, in its opinion below in this case, the Federal Circuit correctly stated: "Neither our decision nor that of the Supreme Court [in *U.S. Shoe*] reached the question of whether section 1581(a) would have been available had a protest been filed and denied following the filing and denial of a refund request." Pet. App. 13a.

As the CIT below properly recognized in this case, while Swisher had "participated as an *amicus curiae*" in the lower courts in *U.S. Shoe*, "as it was not a party it could not obtain a definitive disposition of its theory." Pet. App. 26a. The Federal Circuit's decision below was the first appellate decision to address the jurisdictional question presented here. That decision does not conflict with this Court's *U.S. Shoe* decision.

B. The Petition Ignores The Fundamental Differences Between This Case And *U.S. Shoe*

The court of appeals did not misread its own prior holding—and this Court's opinion—in *U.S. Shoe*. Instead, the narrow, fact-bound decision below correctly determined that this case is procedurally distinguishable from *U.S. Shoe*.

1. The government's petition erroneously confuses the jurisdictional theories raised by the parties in *U.S. Shoe* with the jurisdictional question presented in this case. The government argues that because *U.S. Shoe* rejected jurisdiction under section 1581(a), jurisdiction under section 1581(a)

(Footnote cont'd from previous page.)

administrative agency. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

must automatically be rejected here as well, under different facts. However, the holding below—that a Customs Service decision denying a regulatory refund request can be protested and then reviewed under section 1581(a)—differs significantly from the government's argument in *U.S. Shoe* that a Customs Service "decision" to accept payment of HMT was reviewable under section 1581(a).

The government therefore is simply wrong when it asserts that only "two possible routes have been proposed by the parties and considered by the courts for the recovery of customs exactions improperly imposed on exported goods." Pet. 14. In fact, although only two routes to recovery were at issue under the facts of *U.S. Shoe*, a *third* distinct route is available in the different procedural posture of this case. *See supra* at 12-13.

The government claims that this Court determined in *U.S. Shoe* "that no 'actual' and protestable 'Customs decision' is made in the agency's enforcement of the HMT on exports." Pet. 18. In fact, *U.S. Shoe* held only that no Customs Service decision had been made *in that case*, not that it was impossible for such a decision *ever* to be made regarding the HMT on exports. The Customs Service promulgated a regulation providing a mechanism for obtaining refunds of HMT, 19 C.F.R. § 24.24, which Swisher invoked. After Customs issued a decision denying the refund request, Swisher filed a timely protest. Pet. App. 15a-23a. Although the government's petition neglects to cite this regulation, the court of appeals correctly recognized that 19 C.F.R. § 24.24 created an administrative procedure not invoked by the taxpayer in *U.S. Shoe*, and thus that Swisher's jurisdictional arguments had not been considered or addressed in that case. Pet. App. 12a-13a. The taxpayer in *U.S. Shoe* challenged the collection of the HMT on exports, in a manner that did not involve any decision that could give rise to protest jurisdiction. In contrast, Swisher here sought review of a specific

Customs decision denying its refund.

The court below correctly held that its *U.S. Shoe* holding regarding lack of a protestable decision "was limited to the procedural posture of that case," and recognized that Swisher here "pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff." Pet. App 13a-14a. It is hardly surprising, and certainly does not represent a "conflict," that these different procedural paths led to different jurisdictional bases in this case and in *U.S. Shoe*.

2. The government's argument erroneously assumes that *all* challenges to the HMT must invoke the same jurisdictional basis. But unlike federal district court jurisdiction, which typically does not turn on the nature of the administrative remedies pursued prior to suit, CIT jurisdiction is expressly tied to such remedies. For example, jurisdiction under section 1581(a) is available only when a taxpayer has protested a Customs Service decision, section 1581(b) requires an administrative petition, and section 1581(h) is premised upon having requested and received a Customs Service ruling.[13] The statute of limitations varies depending upon which jurisdictional provision applies.[14]

Under this statutory scheme, the same type of Customs Service action may be subject to review under different bases

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[13] 19 U.S.C. §§ 1514, 1515 (protests giving rise to 1581(a) jurisdiction); *id.* § 1516 (petitions by domestic interested parties giving rise to 1581(b) jurisdiction); 19 C.F.R. part 177 (rulings giving rise to 1581(h) jurisdiction).

[14] *See, e.g.*, 28 U.S.C. § 2636 (a) (section 1581(a) action must be commenced within 180 days of the denial of the protest); § 2636(b) (section 1581(b) action must be commenced within 30 days of denial of petition); § 2636(i) (section 1581(i) action must be commenced within two years of accrual of the cause of action).

of jurisdiction, depending upon the nature of the administrative remedies pursued. For example, the classification of imported merchandise may be challenged through a protest of Customs' decision at the time of importation, followed by judicial review under section 1581(a).[15] Alternatively, the importer may request a pre-importation classification ruling on the same merchandise, and then challenge that ruling under section 1581(h).[16] In either case, the same substantive decision may be reviewed, but under different jurisdictional provisions that depend upon the procedural mechanism invoked.[17]

Thus, the court of appeals merely followed established customs law when it explained that *U.S. Shoe* determined only the jurisdictional basis of *that* lawsuit, not of all conceivable future suits: "Our holding in *U.S. Shoe* thus does not dictate only one possible procedure for challenging the export HMT." Pet. App. 14a.

Furthermore, the argument that jurisdiction under section 1581(a) cannot be available in *this* case because residual jurisdiction under section 1581(i) was found in *another* case, turns the concept of residual jurisdiction on its head. Because residual jurisdiction may not be "used generally to bypass administrative review by meaningful protest," juris-

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[15] *See, e.g., Pagoda Trading Corp. v. United States*, 804 F.2d 665, 667-68 (Fed. Cir. 1986).

[16] *See, e.g., Heartland By-Products, Inc. v. United States*, 74 F. Supp. 2d 1324 (Ct. Int'l Trade 1999) (CIT has jurisdiction to review classification ruling under section 1581(h) where importer shows irreparable harm).

[17] Respondent understands that the brief being filed by Totes-Isotoner, et al. as *amici curiae* includes other examples of situations in which the CIT has reviewed the same types of issues under different jurisdictional provisions, depending on the administrative remedies pursued.

diction under section 1581(i) is not available where jurisdiction in a particular case is available under sections 1581(a) through 1581(h).[18] Thus, the logical starting point for jurisdictional analysis is a determination whether sections 1581(a) through 1581(h) apply; only if they do not is jurisdiction under section 1581(i) possible.[19] But the government asks the Court to *begin* with the proposition that section 1581(i) jurisdiction *is* available, and then reason backwards to conclude that jurisdiction under sections 1581(a) through 1581(h) must *not* be available. The government cites no authority for such a novel approach to jurisdiction.

In the cases on which the government relies, a taxpayer attempted to invoke section 1581(i) residual jurisdiction to remedy its own error in failing to pursue clearcut administrative remedies that would have led to jurisdiction under sections 1581(a) through 1581(h).[20] Here, by contrast, the court of appeals correctly noted that there was widespread confusion as how to challenge the HMT, and Customs itself promulgated erroneous instructions in a Federal Register notice. Pet. App. 13a-14a. Although the refund request procedure of 19 C.F.R. § 24.24 was available to the taxpayer in *U.S. Shoe*, it was entirely appropriate under the circumstances for the

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[18] *United States v. Uniroyal, Inc.*, 687 F.2d 467, 472 (C.C.P.A. 1982).

[19] *See, e.g., Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997).

[20] *See Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987) (importer did not participate in International Trade Administration proceeding that would have given it standing to challenge outcome under section 1581(c)); *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546 (Fed. Cir. 1983) (importer failed to seek a pre-importation ruling which would have given rise to section 1581(h) jurisdiction); *United States v. Uniroyal*, 687 F.2d at 472 (importer failed to file timely protest which would have given rise to section 1581(a) jurisdiction).

courts to waive the exhaustion requirement, rather than require that exporter to request a refund from Customs under the regulation followed by Swisher in this case. But this limited waiver for one exporter cannot be taken to mean that another exporter like Swisher is not permitted to invoke the administrative remedies established under Customs' own regulations; as the court of appeals explained, such an interpretation "would render the refund portion of the regulation superfluous." Pet. App. 17a.

3. The government's argument also erroneously assumes that in confirming that the CIT had section 1581(i) jurisdiction in *U.S. Shoe*, this Court considered and rejected all possible bases for jurisdiction under sections 1581(a) through 1581(h)—including the jurisdictional basis found by the court of appeals here, *of which this Court was never informed through briefing or argument.* In determining whether jurisdiction could exist under sections 1581(a) through 1581(h), courts generally take the facts of a case *as a given*, rather than speculate whether other events *might* make jurisdiction available *if* they occurred.[21] The Federal Circuit below stated that *it* had not considered other theories of jurisdiction in *U.S. Shoe*, but rather that it had only rejected the government's argument that "mere *acceptance* of the exporter's payment of the HMT was a 'decision' of Customs subject to protest." Pet. App. 12a. The government implausibly assumes that in reviewing a Federal Circuit decision that had not considered other jurisdictional theories, this Court nevertheless would, without comment, have consid-

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[21] *See, e.g., Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581 (Fed. Cir. 1984) (CIT has jurisdiction under section 1581(c), even though plaintiffs could bring an action under section 1581(a) if they activated their subzones, imported oil, and protested Customs' assessment of duties).

ered and rejected such theories, even when no party or *amicus curiae* had briefed the theories or asked the Court to rule on them.

The Court's limited discussion of jurisdiction in *U.S. Shoe* appears to have been directed primarily to the only jurisdictional issue actually argued in the *U.S. Shoe* briefs—the contention of the Arctic Cat *amici curiae* that the Court of Federal Claims had jurisdiction, and that the CIT completely lacked jurisdiction, over the dispute.[22] It may have been in response to this argument that the Court in *U.S. Shoe* confirmed that "CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4)," and that because "the CIT has exclusive jurisdiction over challenges to the HMT," the cases pending in the Court of Federal Claims should be transferred to the CIT. 523 U.S. at 366 & n.3. The Court did *not* purport to establish a blanket rule that, on other facts, jurisdiction could not also "accord with" section 1581(a). There is no basis for concluding that this Court ever considered, much less ruled upon, Swisher's jurisdictional theory, which was not presented in *U.S. Shoe*.

C. The Decision Below Is Correct, And Summary Reversal Is Not Warranted

1. The court of appeals' determination as to the basis of CIT jurisdiction here is logical and correct. The Customs Service promulgated a regulation providing a mechanism for obtaining refunds of HMT, 19 C.F.R. § 24.24, and Swisher requested a refund in accordance with that regulation. Pet. App. 4a-5a. Customs' denial of a refund was a "decision" as to "charges or exactions of whatever character," and Swisher

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[22] *See* Mot. and Br. of Arctic Cat, et al., as *Amicus Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*.

filed a timely protest, in accordance with 19 U.S.C. § 1514(a). Pet. App. 15a-23a. When Customs denied the protest, Swisher filed suit to challenge the denial of its protest. Pet. App. 6a. Not surprisingly, the court of appeals determined that this suit challenging the denial of a protest was subject to the CIT's "protest" jurisdiction, section 1581(a). Pet. App. 23a.

2. The government offers no coherent rationale as to why the straightforward jurisdictional theory upheld by the court of appeals is incorrect. The government states that "it is only decisions of the type described in 19 U.S.C. 1514(a) that support a 'protest' that may be reviewed first by the agency (under 19 U.S.C. 1515) and thereafter by the Court of International Trade (under 28 U.S.C. 1581(a))." Pet. 19. The petition catalogues these "types" of decisions as being those determining "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," and "other discrete determinations that support a 'protest' under 19 U.S.C. 1514(a)." Pet. 19. But remarkably, the petition does not even *mention* the category of protestable decisions that the court below actually held to apply here—decisions as to "charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3). Customs' refund decision easily falls within the plain language of this provision, as the court below held.

The government concedes at the outset of the petition that the HMT was an "unconstitutional exaction." Pet. 6. And although the petition does not cite the regulation permitting exporters to obtain refunds of HMT, 19 C.F.R. § 24.24, the government also suggests that Customs made a "decision to deny a return of HMT payments." Pet. 19 n.9. The government does not explain why a "decision to deny a return" of a tax that it concedes to be an "exaction" is not a "decision as to a charge or exaction," and hence squarely within the express terms of section 1514(a), as the court of

appeals held. Pet. App. 18a. The petition obliquely suggests in a footnote that "the denial of a refund request submitted solely on constitutional grounds does *not* represent a 'decision' of any issue for which protest is authorized under 19 U.S.C. 1514." Pet. 19 n.9. However, the petition relies for this proposition solely on the CIT's decision below, which cited no supporting authority, conflicting with the familiar proposition that even constitutional claims generally can be presented to an administrative agency in the first instance.[23] As the court of appeals explained, there is no logical reason to permit refunds of "[e]rroneous overpayments . . . due to miscalculations," but deny refunds for a constitutional defect. Pet. App. 22a.

3. As discussed in section I.A., *supra*, the jurisdictional theory presented in this case was neither briefed nor argued to this Court in *U.S. Shoe*. Summary reversal is usually reserved "for situations in which the law is well-settled and stable, the facts are not in dispute, and the decision below is clearly in error."[24] Even if the Court were to consider the issues raised by this case important enough to warrant review, there is no basis for the Court to decide the case without full briefing and argument.

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[23] *See Thunder Basin Coal*, 510 U.S. at 215 (constitutional challenge to Federal Mine Safety Act must be presented first to the agency and then to the court of appeals, pursuant to statutory review scheme); *Weinberger v. Salfi*, 422 U.S. at 762-65 (constitutional challenges to denial of Social Security benefits must be presented first to the agency, which renders a judicially reviewable "decision" even when it resolves a case by determining that it has no authority to decide a constitutional question); *see also Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) (exhaustion repeatedly required "where, as here, the contention is made that the administrative body lacked power over the subject matter").

[24] *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

II. THE PETITION DOES NOT RAISE AN IMPORTANT, RECURRING ISSUE, BUT INSTEAD CONCERNS THE ADMINISTRATIVE DETAILS OF REFUNDING A DEFUNCT TAX

The government does not support its assertion that "[e]ven outside the context of the Harbor Maintenance Tax, the question presented in this case has substantial recurring importance for the routine administration of the customs laws." Pet. 6. The government contradicts its own statements to this Court three years ago in *U.S. Shoe*, when it expressly declined to seek review of the basis of the CIT's jurisdiction: "This jurisdictional issue is . . . peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. The jurisdictional basis for HMT refunds has not grown any less "peculiar" or any more "recurring" since the tax to which it relates has been declared unconstitutional, but rather precisely the opposite.

1. This case does not represent a new development in customs law. It merely involves a straightforward application of the protest statute, 19 U.S.C. § 1514, to decisions under the refund request portion of the HMT regulation, 19 C.F.R. § 24.24. As the court of appeals explained, the proposition that the denial of a request for refund from Customs is a protestable decision has been well established for the past fifty years. Pet. App. 18a (citing *Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944)). This case thus breaks no new ground in that regard.

2. The universe of possible cases affected by the decision below is limited. The HMT on exports has been held unconstitutional, the regulations relating to its collection have been repealed, and the tax is no longer being collected. *See supra* at 2 n.1. The vast majority of Customs duties, charges and exactions involve *imports*, as to which the jurisdictional basis for CIT review is well established. Pet. App.

21a. In contrast, the refund request procedure at issue in this case is unique to the HMT on exports and on domestic shipments. Nor are export taxes likely to be collected in other contexts; such taxes are unconstitutional. Thus, once the refunds of HMT have been distributed, no new cases can arise.

3. The court of appeals did not, as the government seems to suggest, create a sweeping rule that would allow litigants to select jurisdiction so as to evade statutes of limitations at will. Rather, the court of appeals' narrow and fact-bound jurisdictional holding is limited to the specific context of the HMT on exports.

The decision below does not give taxpayers an ability to elect their own statutes of limitations. Nothing in *U.S. Shoe* or the decision below abrogates the principle that a taxpayer must exhaust its administrative remedies unless a court, in its discretion, waives exhaustion. Taken in context with this case, *U.S. Shoe* may best be read as having waived the exhaustion requirement in what the court below correctly noted to be an atmosphere of procedural confusion in which the constitutional challenges to HMT arose. Pet. App. 13a-14a, 22a.[25] It would be quite extraordinary to read *U.S. Shoe* as having decided—without the issue having been raised, much less briefed or argued—that parties *cannot* rely on

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[25] As the court of appeals recognized, "there was much confusion in Customs and among exporters as to the proper procedure for challenging the constitutionality of the HMT as applied to exports." Pet. App. 13a. Thousands of challenges to the HMT were filed within a short period of time, in the CIT, in the Court of Federal Claims, and even in district court. The Customs Service itself promulgated a misleading Federal Register notice, incorrectly instructing exporters that they must file protests within ninety days of payment of HMT. Pet. App. 5a, 13a-14a. Thus, the court of appeals recognized that at the time of the *U.S. Shoe* litigation, "there was not one obvious jurisdictional basis that this court could have required the *U.S. Shoe* plaintiff to use." Pet. App. 14a.

agency regulations to exhaust their administrative remedies, as Swisher did here, and therefore *must* claim refunds by proceeding directly to Court. The logical extension of the government's argument would be that the Court in *U.S. Shoe* intended to deny other taxpayers the right to exhaust the administrative remedies specifically provided in Customs regulations.

Congress did not impose a limitations period for requesting refunds of HMT, and the Customs Service did not establish one in its refund request regulation, 19 C.F.R. § 24.24. If the absence of a limitations period for requesting refunds of HMT were considered to be anomalous, Congress and the Customs Service have the power to provide one without intervention by the Court. As the court below recognized, "Customs was free to impose time limits on the filing of HMT refund requests," and it "remains free to alter the regulation to impose a time limit in the future." Pet. App. 21a-22a.

Finally, the decision below does not create any "confusion in the law," as the government claims. Pet. 20. The Federal Circuit's most recent decision concerning the details of implementing HMT refunds, *Stone Container Corp. v. United States*, had no trouble reconciling the availability of review under the procedures outlined in *U.S. Shoe* and in this case.[26]

4. The total amount of money at stake, which the government estimates as being at most $500 million (Pet. 6), also does not justify review by this Court. This case does not raise any new exposure to the public fisc. The only question here is the degree to which refunds already mandated by the

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[26] Nos. 99-1333, 99-1334, 2000 WL 1514376 (Fed. Cir. Oct. 12, 2000).

holding of *U.S. Shoe* will be limited on jurisdictional, and hence statute of limitations, grounds.

The cases the government cites for the proposition that certiorari is appropriate for "decisions of significant fiscal and administrative importance" are readily distinguishable. *See* Pet. 14. Several cases cited in the petition involved recurring issues under the Internal Revenue Code.[27] None of those cases involved a tax that was no longer being collected. The other case cited, *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), presented the recurring issue whether *Chevron* deference applies to Customs Service regulations. Indeed, the constitutional question in *U.S. Shoe*, and the broad issues of administrative law involved in the other customs matters in which the Court has granted certiorari in recent Terms—*Haggar* and *United States v. Mead Corporation*[28]—contrast sharply with the unique, fact-bound jurisdictional issue here. *Haggar* and *Mead* involve fundamental issues of administrative law that recur in virtually every Customs Service decision, and that implicate the workings of other agencies as well; by contrast, this case involves the jurisdictional basis for issuing a finite number of refunds of a defunct tax.

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[27] *See United States v. Hill*, 506 U.S. 546 (1993) (whether adjusted basis includes certain depreciable drilling and development costs); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (whether "accumulated profits" in the indirect tax credit provision of the Internal Revenue Code are to be measured in accordance with United States or foreign tax principles); *United States v. American Bar Endowment*, 477 U.S. 105 (1986) (treatment of tax exempt organization's income derived from offering group insurance to its members).

[28] No. 99-1434 (oral argument scheduled November 8, 2000) (whether Customs Service classification decisions are entitled to *Chevron* deference).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
JOSEPH F. DENNIN
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Respondent

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

versus

SWISHER INTERNATIONAL, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE TOTES-ISOTONER, CORPORATION ET. AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John M. Peterson
Counsel of Record
Michael K. Tomenga
George W. Thompson
Curtis W. Knauss
Maria E. Celis
Neville, Peterson & Williams
80 Broad Street,
34th Floor
New York, NY 10004
(212) 635-2730
Attorneys for Amici Curiae
Totes-Isotoner Corporation et. al.

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a), upon written consent of all parties, *amici curiae* Totes-Isotoner Corporation, *et al,*[1] respectfully submit this brief *amicus curiae* in support of Respondent, Swisher International, Inc., and submits that the petition for a writ of *certiorari* should be denied.

INTEREST OF *AMICI CURIAE*[2]

Amici curiae are exporters of waterborne commercial cargo who paid the Harbor Maintenance Tax ("HMT")[3] which this Court unanimously struck down as unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998)("*United States Shoe*"). Like Respondent Swisher International, Inc., *amici* have pursued refunds of the unconstitutionally-exacted tax by filing refund claims with the United States Customs Service ("Customs"), using the refund claims procedure which Customs established in its regulations, 19 C.F.R. § 24.24(e)(5).[4] Upon receiving

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[1] *Amici curiae* on whose behalf this brief is filed are: Totes-Isotoner, Corporation (as successor to Aris-Isotoner Inc.); Berwick Industries, Inc.; Chevron Chemical Company, Inc.; Chevron Chemical International Sales, Inc.; Chevron International Oil Company; Chevron Overseas Petroleum, Inc.; Chevron U.S.A. Inc.; Del Monte Foods, Inc.; Eastman Chemical Company; Fieldston Clothes, Inc.; Marconi Systems (f/k/a Gilbarco, Inc.); Michelin North America, Inc.; Microsoft Corporation; The Pillsbury Company; Rhodia, Inc. (f/k/a Rhone-Poulenc, Inc.); Rockwell International Corporation; Crompton Corporation (f/k/a Uniroyal Chemical Company Inc.); Xerox Corporation, Americas Operations Division; Xerox Corporation, Southern California Manufacturing Operations Division; and Xerox International Partners.

[2] Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Court under separate cover. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the listed *amici* made a monetary contribution to the preparation or submission of this brief.

[3] 26 U.S.C. § 4461 *et seq.*

[4] 19 C.F.R. § 24.25(e)(5). Provides in pertinent part:

Customs decisions denying their HMT refund claims, *amici* filed protests with Customs pursuant to Section 514(a)(3) of the Tariff Act of 1930, *as amended,* challenging Customs' decisions.[5]

Amici agree with Respondent that the Federal Circuit correctly held: (1) that Customs' denials of 19 C.F.R. § 24.24(e)(5) refund claims are "decisions" relating to a "charge or exaction," and are protestable under 19 U.S.C. § 1514(a)(3); and (2) that, following denial of a timely-filed protest, exporters may file actions in the United States Court of International Trade ("CIT") pursuant to 28 U.S.C. § 1581(a), which gives that court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under Section 515 of the Tariff Act of

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24.24. Harbor Maintenance Fee

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(e) Collections.

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(5) Refund and supplemental payment. When a refund is requested or a supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or a supplemental payment is made.

[5] 19 U.S.C. § 1514(a)(3) authorizes the filing of a protest to challenge "decisions of the Customs Service" relating to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury."

1930."[6] The Federal Circuit's holding presents no significant legal issue, but merely acknowledges the scope of the CIT's longstanding "protest" jurisdiction. The petition for *certiorari* in this case raises no significant legal issue for review by this Court, and should be denied.

SUMMARY OF ARGUMENT

The Federal Circuit's decision below does not conflict with this Court's opinion in *United States Shoe*, but is perfectly consistent therewith. This Court's observation that the CIT properly exercised its 28 U.S.C. § 1581(i) jurisdiction in *United States Shoe*, in the absence of an "actual Customs decision," does not preclude the exercise of the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction in cases where, as here, a litigant has obtained a protestable "decision of the Customs Service" regarding a "charge or exaction," pursuant to 19 U.S.C. § 1514(a)(3).

It is well-settled that the basis for the CIT's jurisdiction over particular cases is based on the specific jurisdictional facts of each case. The CIT's decision to hear a constitutional challenge to a statute under provision of 28 U.S.C. § 1581 does not preclude the court from hearing similar challenges under a different part of that statute, for example where a litigant exhausts administrative protest remedies and invokes the CIT's Section 1581(a) "protest" jurisdiction.

Petitioner's claim that this case raises issues of sovereign immunity is also misplaced. Respondent has complied with the statute of limitations governing the waiver of sovereign immunity in this case. Thus, the petition

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[6] *Amici* participated in the briefing and argument of this case before the CIT, and in the briefing of the case before the Court of Appeals for the Federal Circuit. In addition, *amici* advanced their position regarding jurisdiction in briefing and argument before those same courts in *United States Shoe*, *supra*.

presents no significant issues of law for this Court.

STATEMENT

1. When the first lawsuits challenging the constitutionality of the export HMT were filed in 1994, exporters needed to determine the proper forum and procedure for such challenges. The Water Resources Development Act of 1986,[7] which imposed the HMT, did not specify a procedure for seeking refunds of the tax but only indicated that, for purposes of determining the jurisdiction of administrative agencies and courts, the tax should be treated "as if it were a customs duty." 26 U.S.C. § 4462(f)(1), (2). Most exporters filed challenges to the HMT in the United States Court of International Trade; some, however, brought suit in the Court of Federal Claims or in federal district court. In *United States Shoe*, this Court confirmed that the CIT "properly exercised jurisdiction" over cases challenging the constitutionality of the tax. 523 U.S. at 365.

While the CIT's exclusive jurisdiction over HMT challenges is now undisputed, Customs has consistently sought to limit the basis for that court's exercise of jurisdiction, in an effort to maximize the government's retention of the unconstitutionally-collected taxes.

Exporters have proceeded under two subsections of the CIT's jurisdictional statute. These are 28 U.S.C. § 1581(a), which, as noted above, gives the CIT exclusive jurisdiction over actions "to contest the denial of a protest," including protests against "charges and exactions"; and 28 U.S.C. § 1581(i), a "residual" provision which gives the CIT exclusive jurisdiction over actions arising out of any law providing for, *inter alia*, "revenues from imports or tonnage," "tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "administration and enforcement" of matters arising

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[7] Pub. L. No. 99-662, 100 Stat. 4082 (1986).

under the Customs and trade laws. While both subsections confer jurisdiction on the CIT, they are subject to different statutes of limitations.[8]

2. While petitioner asserts that Section 1581(i) provides the *only* basis for the CIT to hear HMT challenges, it initially took the opposite position, arguing that exporters could only invoke the CIT's Section 1581(a) protest jurisdiction. This position was based on *Treasury Decision 94-91* (28 Cust. B. & Dec. No. 48 (1994)), in which the Customs Service asserted that the exporter's payment of the HMT, and Customs' acceptance of that payment, constituted a protestable "decision of the Customs Service" regarding the constitutionality of the tax, requiring exporters to file protests within 90 days thereafter. In *United States Shoe*, both the CIT and Federal Circuit held that mere payment/acceptance of the HMT was a passive act, rather than a "decision of the Customs Service," and ruled that the act of payment did not trigger a protest right. *United States Shoe*, 19 Ct. Int'l Trade 1284, 1297 (1995); *aff'd*, 114 F.3d 1564, 1569 (Fed. Cir. 1997).

3. Many exporters, believing that the mere payment of the HMT was a passive, statutorily-mandated act, rather than a protestable "decision," filed suits in the CIT, invoking that court's 28 U.S.C. § 1581(i) jurisdiction. By late 1994, hundreds of challenges to the constitutionality of the export HMT had been filed in that court. After consulting with counsel for exporters and the government, the Chief Judge of the CIT selected *United States Shoe* as a "test case" for determining both the constitutionality of the HMT and the basis for jurisdiction over challenges to the tax. *United States Shoe* was in part selected because the plaintiff had followed the procedure outlined by Customs in *Treasury*

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[8] Actions under Section 1581(a) must be commenced within 180 days after the mailing of notice of denial of a protest (28 U.S.C.§ 2636(a)(1)), while actions under Section 1581(i) must be commenced within two years after the plaintiff's cause of action accrues (28 U.S.C. § 2636(i)).

Decision 94-91 and had asserted the CIT's jurisdiction under *both* 28 U.S.C. §§ 1581(a) and (i). On February 15, 1995, the CIT published a "Scheduling Order" designating *United States Shoe* as a "test case," staying all other export HMT lawsuits, and directing the parties to file briefs on several issues, including "[w]hether the court has subject matter jurisdiction to hear and decide this type of case," and "[i]f so, does the court have that authority under 28 U.S.C. § 1581(a) or (i) or (a) and (i)?"[9]

As noted above, both the CIT and the Federal Circuit rejected Customs' assertion that mere payment of the HMT constituted a protestable Customs decision, and, on the facts of *United States Shoe*, held that the CIT had properly exercised jurisdiction in that case under 28 U.S.C. § 1581(i).

4. Although the government did not seek review of the lower courts' jurisdictional findings in *United States Shoe*, this Court's opinion did observe (at 365-366) that the CIT had properly exercised its 28 U.S.C. § 1581(i) jurisdiction in that case. Referring to the act of collecting the HMT, this Court noted that "protests are not pivotal, for Customs 'performs no active role,' it undertakes 'no analysis [or adjudication],' 'issues no directives,' 'imposes no liabilities'; instead, Customs 'merely passively collects' HMT payments. 114 F.3d at 1569." 523 U.S. at 365. At the same time, this Court took note of the CIT's 28 U.S.C. § 1581(a) protest jurisdiction, stating:

> Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the CIT in "any civil action commenced to contest the denial of a protest." *A protest, as indicated in 19 U.S.C. Section 1514, is an essential prerequisite when one challenges an actual Customs decision.*

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[9] *United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade 288 (1995).

523 U.S. at 365-66 (emphasis added). Since there had been no "actual Customs decision" regarding the HMT in *United States Shoe*, protest jurisdiction was not appropriate in that case.

5. In contrast to the plaintiff in *United States Shoe*, Respondent Swisher, *amici*, and other exporters pursued administrative remedies which *did* result in the issuance of a protestable "actual Customs decision" regarding the HMT. Swisher filed a refund claim with Customs pursuant to the specific procedure established in 19 C.F.R. § 24.24(e)(5), claiming that the HMT was an unconstitutional tax on exports, and demanding a refund. In response, Swisher received a "decision of the Customs Service," holding that the export HMT was not an unconstitutional tax on exports, but rather a permissible "user fee." Swisher protested this decision pursuant to 19 U.S.C. § 1514 and, upon denial of its protest pursuant to 19 U.S.C. § 1515(b), filed this suit invoking the CIT's 28 U.S.C. § 1581(a) protest jurisdiction.

Swisher was apparently the first plaintiff to receive a denied protest based upon a Customs decision rendered pursuant to 19 U.S.C. § 24.24(e)(5). It filed this action in the CIT in March, 1995 — after *United States Shoe* had been selected as the "test case" for determining the constitutionality of the export HMT. Thus, whether Customs' denial of a refund claim constituted a protestable "decision of the Customs Service" regarding the HMT was not before the courts in *United States Shoe*. Accordingly, following this Court's *United States Shoe* decision holding the export HMT to be unconstitutional, the CIT issued a new *Order*, designating Swisher's case as a "test case" regarding the extent of the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction over HMT challenges.[10]

The Federal Circuit acknowledged that the basis of

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[10] *See United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade Lexis 17 (1998).

protest jurisdiction advanced by Respondent Swisher had not been presented in *United States Shoe* (*See Pet.*[11] at 9a-10a), and held that the export HMT is a "charge or exaction," so that Customs' denial of a 19 C.F.R. § 24.24(e)(5) refund claim is a protestable "decision of the Customs Service" regarding same. *See Pet.* at 16a-18a, which gives rise to a cause of action cognizable in the CIT under 28 U.S.C. § 1581(a). This decision did no more than acknowledge and apply the well-established and by now unremarkable principle that the precise statutory basis under which the CIT exercises jurisdiction depends upon the facts of the case.

ARGUMENT

REASONS FOR DENYING THE PETITION

A. The Federal Circuit's Decision Does Not Conflict With this Court's Statements in *United States Shoe*

1. Petitioner asserts (*Pet.* at 13) that the Federal Circuit's decision below "directly conflicts" with this Court's ruling in *United States Shoe*, in particular with this Court's observation that the CIT properly exercised its 28 U.S.C. § 1581(i) jurisdiction in that case. *See Pet.* at 17-19. However, as noted above, this Court's statements in *United States Shoe* only spoke to the issue of whether, *under the facts of that case*, a protestable "decision of the Customs Service" existed which could give rise to the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction. Indeed, this Court quoted that part of the Federal Circuit's decision in *United States Shoe* concerning "the government's argu[ment] that the relevant

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[11] *Petition for A Writ of Certiorari by United States of America* in *United States v. Swisher International*, No.00-415.

'decision' is Customs' acceptance of the exporter's payment,"[12] and cited with approval the Federal Circuit's holding that, because the passive act of collecting the tax involved no "decision" of the Customs Service, it did not satisfy the requirements for establishing 28 U.S.C. § 1581(a) jurisdiction *in that case*.

Contrary to petitioner's assertion, however, this Court's *United States Shoe* decision never addressed, much less foreclosed, the possibility that taxpayers such as Swisher might obtain protestable "decisions of the Customs Service" regarding the HMT, and challenge them under the CIT's 28 U.S.C. § 1581(a) protest jurisdiction. As noted above, the Water Resources Development Act requires that the HMT be treated as a "customs duty" for purposes, *inter alia*, of determining the jurisdiction of courts. 26 U.S.C. § 4462(f)(1), (2). This Court's *United States Shoe* decision specifically noted that "Section 1581(a) surely concerns customs duties," and "confers jurisdiction on the CIT to hear any civil action commenced to contest Customs' denial of a protest." This Court further reaffirmed that "*[a] protest, as indicated in 19 U.S.C. Section 1514, is an essential prerequisite when one challenges an actual Customs decision.*" 523 U.S. at 365-66. The Respondent here has simply trod a different path to judicial review of the export HMT than the plaintiff in *United States Shoe*; it has secured a protestable "decision" regarding an exaction of the HMT, protested it, and filed a 28 U.S.C. § 1581(a) suit to challenge the denial. This manner of proceeding is consistent with, and apparently anticipated by, this Court's *United States Shoe* decision.

2. In any event, far from constituting a "controlling precedent," as petitioner suggests (*Pet.* at 20), this Court's observations in *United States Shoe* were *dicta*. The government pointedly did not ask this Court in *United States*

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[12] 114 F.3d at 1568 (Fed. Cir. 1997).

Shoe to consider the lower courts' holdings that the CIT exercised jurisdiction over that case under 28 U.S.C. § 1581(i), and the parties' briefs to this Court did not address the question of jurisdiction at all.[13] In fact, the government's petition for *certiorari* in *United States Shoe* noted (at 7, n. 2) that the issue of jurisdiction was only relevant "for other claimants, who have challenged the Harbor Maintenance Tax *without first filing an administrative protest.*" (Emphasis added). The government's petition in *United States Shoe* also suggested that "[t]he jurisdictional issue is, moreover, peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." *Id.* If, as the government asserts in *this* case, the selection of a particular basis of CIT jurisdiction forecloses all other possible ways of proceeding in that court, then this issue should have been presented to this Court in *United States Shoe*. The government's shifting positions on the question of CIT jurisdiction over exporters' HMT claims confirms that its *certiorari* petition in this case does not raise any significant jurisprudential issues, but is motivated solely by the government's displeasure with the Federal Circuit's decision and the possibility that exporters may thereby be able to secure additional refunds of the unconstitutionally-exacted taxes.

Petitioner's claim that *United States Shoe* is a "controlling precedent" on the issue of jurisdiction ignores Supreme Court Rule 23.1(c), which provides that only the questions set forth in the petition or fairly comprised therein

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[13] Indeed, the Court's comments regarding jurisdiction in *United States Shoe* appear to have been intended as a response to certain *amici curiae* who did not restrict their briefing to the Constitutional issue for which *certiorari* was granted, but who argued instead that the Court of Federal Claims ("CFC") had exclusive jurisdiction to hear actions involving the HMT. *See United States Shoe*, 523 U.S. at 366, n. 3 (acknowledging the CIT's exclusive jurisdiction, and noting that challenges filed in the CFC could be transferred to that court).

will be considered by the Court. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 624 (1974); *National Licorice Co. v. NLRB*, 309 U.S. 350, 357 (1940). Where this Court grants *certiorari* to review a jurisdictional issue, it solicits briefing from the parties on the issue, and makes an express decision regarding whether the lower court's holding on jurisdiction shall be affirmed or reversed. *See, e.g., Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Gsell v. Insular Collector of Customs*, 239 U.S. 93 (1915); *K Mart Corp. v. Cartier Inc.*, 485 U.S. 176 (1988). No such holding was issued in *United States Shoe*; while this Court noted that the CIT had exclusive jurisdiction over HMT challenges, it never held, or even suggested, that the CIT's power to hear such challenges was cabined within a single subsection of that court's jurisdictional statute, 28 U.S.C. § 1581. Rather, this Court noted that 28 U.S.C. § 1581(i) jurisdiction was proper under the facts of *United States Shoe*, and acknowledged that protest procedures would be proper, as in this case, where a "decision" of the Customs Service is involved. The ruling of the Federal Circuit in this case is consistent with that view.

B. The Exercise of the CIT's 28 U.S.C. § 1581(i) "Residual" Jurisdiction in *United States Shoe* Does Not Bar The Exercise of 28 U.S.C. § 1581(a) "Protest" Jurisdiction in Cases Where a Protestable "Decision of the Customs Service" Has Been Issued

Petitioner asserts that the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction is "not an available route for challenging the constitutionality of the [Harbor Maintenance] tax on exports." *Pet.* at 15. Nowhere does petitioner challenge the Federal Circuit's ruling that the export HMT is a "charge or exaction of whatever character within the jurisdiction of the Secretary of the Treasury," and thus

subject to protest pursuant to 19 U.S.C. § 1514(a)(3). Nor does petitioner deny that Customs' October 26, 1994 letter to Swisher, denying the company's 19 C.F.R. § 24.24(e)(5) HMT refund claim, was a "decision of the Customs Service" regarding such "charge or exaction."[14] Instead, petitioner claims that because the CIT was found to have properly exercised its 28 U.S.C. § 1581(i) jurisdiction on the facts of *United States Shoe*, *supra*, all other avenues for exporters to seek judicial review of the HMT in that court are thereby foreclosed. Petitioner's "foreclosure theory," however, rests on a fundamental misstatement of the jurisprudence regarding the CIT's 28 U.S.C. § 1581(i) jurisdiction. While the courts have held that the CIT's 28 U.S.C. § 1581(i) jurisdiction should generally not be invoked unless other avenues for jurisdiction are unavailable or "manifestly inadequate," the selection of the appropriate jurisdictional vehicle has depended upon the facts of each case, and the sound discretion of the CIT. That the CIT hears particular issues pursuant to its Section 1581(i) jurisdiction in one case (as in *United States Shoe*) has never been deemed to foreclose other plaintiffs from seeking review of the same or similar issues using different procedures. Indeed, petitioner's "foreclosure theory" is without precedential support, and is plainly contrary to the statutes governing the CIT's jurisdiction.

1. In *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988), the Federal Circuit summarized its jurisprudence regarding the CIT's 28 U.S.C. § 1581(i) jurisdiction, observing that it should not be invoked when "jurisdiction under another subsection of Section 1581 is or could have been available, *unless* the remedy provided under that other subsection

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[14] That Customs' refusal to refund a charge or exaction is a protestable "decision" has been settled law since *Eurasia Import Co., v. United States*, 31 C.C.P.A. 202, 211-12 (1944).

a litigant invoking the CIT's Section 1581(i) jurisdiction bears the burden of showing that other avenues of jurisdiction are unavailable or inadequate. The Federal Circuit commented upon the burden which *Miller* places on Section 1581(i) litigants in *Conoco, Inc. v. Foreign Trade Zones Bd* (*"Conoco"*), 18 F.3d 1581, 1584 n. 8 (Fed. Cir. 1994):

> This threshold requirement does not appear in the statute, but finds expression in certain of our precedents. *See, e.g., Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988). It may have a basis in the prefatory "in addition to" language of subsection (i). *See United States v. Uniroyal, Inc.*, 69 C.C.P.A. 179, 687 F.2d 467, 475 (C.C.P.A. 1982)(Nies, J., concurring). It presumably serves the purpose of carrying out Congress' intent that subsection (i) be a "residual" grant of jurisdiction, and not be used to routinely bypass the "traditional method" of obtaining judicial review of international trade disputes involving Customs — filing a protest and then seeking judicial review if Customs denies the protest. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3279, 3758.

The "*Miller* rule" therefore acknowledges that the CIT's 28 U.S.C. § 1581(i) jurisdiction is "in addition to" that court's other jurisdiction grants, and that its use is appropriate where

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Miller which clearly delineates that unless another subsection under 19 U.S.C. § 1581 would be "manifestly inadequate," section 1581(i) may not be invoked. *Pet.* at 12.

other jurisdiction grants, and that its use is appropriate where the remedies afforded under 28 U.S.C. § 1581(a)-(h) are either unavailable or inadequate. *Miller* also confirms that the filing of a protest against a Customs decision — the precise pathway followed here — is the "traditional" method for seeking judicial review of Customs' decisions.

Courts have invoked the "*Miller* rule" to decline to hear cases under Section 1581(i) where litigants failed to avail themselves of other available avenues of jurisdiction, such as 28 U.S.C. §1581(a) "protest" jurisdiction,[16] Section 1581(b) "domestic interested party petition" jurisdiction,[17] or Section 1581(c) jurisdiction to review Commerce Department antidumping or countervailing duty assessments,[18] without showing why such remedies were inadequate under the circumstances.

2. However, the CIT has frequently exercised its Section 1581(i) "residual" jurisdiction to hear cases which could have been raised by protest and brought to court under 28 U.S.C. § 1581(a), or addressed under other bases of the CIT's jurisdiction. For example, in *Conoco, supra*, the Federal Circuit held that an importer challenging a Foreign Trade Zones Board decision imposing duties on certain

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[16] *See, e.g., United States v. Uniroyal, Inc.*, 687 F.2d 467, 475 (C.C.P.A. 1982)(Section 1581(i) challenge to exclusion of merchandise not allowed when protest remedy was available, and no irreparable harm would result from its use); *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed. Cir. 1995)(CIT properly declined to exercise Section 1581(i) jurisdiction where importer failed to file timely protest reviewable under Section 1581(a)).

[17] *National Corn Growers Ass'n. v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988)(Section 1581(i) jurisdiction held improper in action by domestic party challenging Customs decision, where effect of allowing such jurisdiction would be evasion of 19 U.S.C.§ 1516 "domestic interested party" procedures); *Norcal/Crosetti Foods Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992)(same).

[18] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

merchandise should be permitted to proceed under Section 1581(i), rather than being required to complete an import transaction, pay and protest duty assessments, and invoke the CIT's protest jurisdiction. The Federal Circuit reasoned that a protest would have been futile. Years earlier, virtually the same issue had been addressed in a case brought under the "protest" jurisdiction of the Customs Court, the CIT's predecessor. *See Hawaiian Indep. Refinery Co. v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978).

Where Section 1581(a) protest jurisdiction is available, but the outcome of the protest is predetermined, the courts have readily approved the CIT's exercise of jurisdiction under 28 U.S.C.§ 1581(i). *See, e.g., United States Canes Sugar Refiners' Ass'n. v. Block*, 544 F. Supp. 883, 887 (Ct. Int'l Trade), *aff'd on other grounds*, 683 F.2d 339 (C.C.P.A. 1982)(challenge to Presidentially-imposed quotas on sugar imports); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992)(surety challenge to duty demand). Similarly, where determinations could have been reviewed under the CIT's 28 U.S.C. § 1581(c) jurisdiction over Commerce Department antidumping and countervailing duty decisions, but such review is inadequate under the circumstances, the CIT's power to hear the case under its Section 1581(i) "residual" jurisdiction is well-recognized. *See, e.g., NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998)(challenge to initiation of antidumping investigation). Invoking Section 1581(i) is also appropriate where other bases of jurisdiction are unavailable. *Mitsubishi Elec. Am. Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

The choice of the proper jurisdictional basis depends upon the facts of each case: "if remedies ultimately available under 28 U.S.C. § 1581 are rendered useless *by particular factual circumstances*, such remedies may be manifestly inadequate or ineffective." *Companhia Brasileira Carbureto de Calcio v. United States*, 18 Ct. Int'l Trade 215 (1994). *See also Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997)(litigant seeking judicial review of

regulations under Section 1581(i) not required to apply for ruling and seek pre-importation declaratory relief under 28 U.S.C. § 1581(h), where nature of ruling would be a foregone conclusion).

Thus, the basis for exercise of the CIT's jurisdiction has always been fact-dependent. For example, Administrative Procedure Act challenges to Customs regulations have been entertained under the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction,[19] its Section 1581(h) "declaratory judgment" jurisdiction,[20] and its Section 1581(i) "residual" jurisdiction.[21] Each of the referenced subsections has different prerequisites for the institution of a suit, directly refuting petitioner's suggestion that there can only be one pathway to CIT jurisdiction for a given type of challenge.

Moreover, no judicial decision, legislative history or other authority has ever announced or supported the unique "foreclosure theory" advanced in the Petition. It is true, as noted above, that a litigant seeking to invoke Section 1581(i) must show that other avenues for CIT jurisdiction are unavailable or inadequate in its case. However, the suggestion that once the CIT exercises Section 1581(i) jurisdiction in a given case, all other litigants are foreclosed from pursuing other bases of jurisdiction is without any foundation. That the plaintiff in *United States Shoe* was allowed to proceed without first protesting an "actual Customs decision" by no means debars litigants such as Swisher, who secured such decisions and followed the more

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[19] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

[20] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

[21] *See Pac Fung Feather Co. v. United States*, 111 F.3d 114 (Fed. Cir. 1997).

"traditional" route for invoking CIT jurisdiction.

The notion that litigants having a common grievance may approach a court of competent jurisdiction under separate procedural vehicles hardly presents a significant legal issue. *See, e.g., Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992). In *Techsnabexport, Ltd. v. United States*, 16 Ct. Int'l Trade 420, 423-426 (1992), the CIT held that its authority to accept jurisdiction over a case is not circumscribed by its choice of a different jurisdictional vehicle to hear other cases raising similar issues.

3. That the Petition fails to raise a credible legal issue is further demonstrated by 28 U.S.C. § 2637, which provides that the CIT "shall, *where appropriate*, require the exhaustion of administrative remedies." (Emphasis added). This statute grants the CIT the equitable, discretionary power to require or waive the exhaustion of administrative remedies as a condition to invoking the court's jurisdiction. The exercise of this power is reviewable by appellate courts only for abuse of discretion. *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998); *United States v. Priority Prods, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). That the CIT is empowered to decide legal issues framed by an administrative protest (as in *Swisher*), or without a protest (as in *United States Shoe*), does not involve a significant legal issue, but merely a fact-specific exercise of the CIT's discretion.

Indeed, prior to the enactment of the *Customs Courts Act of 1980*, a protest was the exclusive means for challenging a Customs decision, even where constitutional issues were raised. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). In passing the 1980 Act, Congress indicated that the CIT's Section 1581(a) protest jurisdiction "merely restates existing law as to the jurisdiction of the Customs Court," S. Rep. No. 466, 96th Cong., 1st Sess. 7 (1980), and thereby continues to embrace constitutional questions.

4. The *"Miller* rule" on which petitioner relies holds

that a party seeking to invoke the CIT's Section 1581(i) "residual" jurisdiction bears the burden of demonstrating that jurisdiction under 28 U.S.C. § 1581(a) – (h) is either unavailable or manifestly inadequate. However, this burden is not properly thrust upon Respondent Swisher, which asserted jurisdiction under 28 U.S.C.§ 1581(a). Whether the CIT has jurisdiction over an action pursuant to 28 U.S.C. § 1581(a) is not a discretionary matter. *See United States v. Boe (Servco Co., Party-in-Interest)*, 64 C.C.P.A. 11, 16 (1976). Where, as here, jurisdiction is asserted under 28 U.S.C. § 1581(a), the only jurisdictional questions for the courts to decide are: (1) whether the plaintiff has received a "decision of the Customs Service" regarding one of the matters enumerated in 19 U.S.C. § 1514; and (2) whether such decision was timely protested. As this Court has stated, "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them," and "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *McCarthy v. Madigan,* 503 U.S. 140, 146 (1992), *citing Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-818 (1976) and *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264 (1821).

In holding that the CIT could exercise its Section 1581(a) "protest" jurisdiction in this case, the dispositive determination by the Federal Circuit was that the export HMT was a "charge or exaction of whatever character within the jurisdiction of the Secretary of the Treasury." The petition does not challenge or seek review of this outcome-determinative holding, nor does it contest the timeliness of Swisher's protest. Indeed, petitioner avoids this issue to the point of disingenuousness, asserting (*Pet.* at 19) that decisions regarding the HMT do not fall within certain categories of protestable decisions, while failing to even mention the "charges and exactions" provision in Section 1514(a)(3) on which the Federal Circuit's decision rests.

5. Petitioner's claim of sovereign immunity (*Pet.* at

20-21) raises no issue deserving of review by this Court. While it is true that statutes of limitations may be enforced against claims for refund of an unconstitutional tax, *see McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 25 (1990), the statute of limitations for actions involving Customs' denial of protests is clear, and begins to run only after the protest is denied. *See* 28 U.S.C. § 2636(a). Nor does the use of the protest remedy allow for evasion of any statute of limitations. Exporters who received HMT refunds pursuant to 28 U.S.C. § 1581(i), as in *United States Shoe*, are free to claim refunds of tax payments not covered by those actions, and to protest any Customs denials respecting such refunds. In subsequent actions brought pursuant to the CIT's 28 U.S.C. § 1581(a) protest jurisdiction, the government would be free to pursue any defenses of laches, waiver, or election of remedies which it might have with respect to those claims as, indeed, the government could have raised in the instant case. *See Stone Container Corp. v. United States*, 2000 U.S. App. Lexis 25466, No. 99-1333 (Fed. Cir. 2000).

CONCLUSION

The petition for a writ of *certiorari* presents no significant issue regarding the jurisdiction of the United States Court of International Trade to hear cases seeking refunds of the export HMT, and alleges no material error in the decision of the court below. The petition should be denied.

Respectfully submitted,

John M. Peterson
Counsel of Record
George W. Thompson
Michael K. Tomenga
Lawrence J. Bogard
Curtis W. Knauss
Maria E. Celis
NEVILLE, PETERSON & WILLIAMS
Attorneys for Amici Curiae
Totes-Isotoner, Corporation et al.
80 Broad Street
New York, New York 10004
(212) 635-2730

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In The Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

SWISHER INTERNATIONAL, INC., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

SIDNEY N. WEISS
Counsel of Record
President
Customs and International
Trade Bar Association
90 Park Ave., 17th Floor
New York, NY 10016
Counsel for *Amicus Curiae*
(212) 986-5309

M. PAGE HALL, II
Dorsey & Whitney LLP
1001 Pennsylvania Ave., N.W., Suite 300 South
Washington, D.C. 20004

Of Counsel

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INTEREST OF THE AMICUS CURIAE

The Customs and International Trade Bar Association ("CITBA")[1], organized in 1919, is a national professional association of lawyers who practice customs and international trade law before federal courts and agencies with jurisdiction over such matters. This brief reflects the judgment of CITBA members reached in the exercise of their profession and is offered solely to assist the Court in determining whether there is any systemic need to grant certiorari in this matter.

SUMMARY OF ARGUMENT

The decision by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") will not have a recurring impact on the administration of customs laws by the United States Customs Service ("Customs"). As a matter of practice, the Federal Circuit's decision in *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000) ("*Swisher*"), will not cause any confusion among customs law practitioners or the courts, and is not inconsistent with the jurisdictional ruling made by this Court in *United States v. United States*

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[1]Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus,* its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented to the filing of this brief.

Shoe Corp., 523 U.S. 360 (1998) (*"U. S. Shoe"*). Furthermore, the administrative remedy promulgated by Customs was fully within the statutory framework authorizing the Harbor Maintenance Tax ("HMT"). The regulations promulgated under the statute contain any limit on the time for a party to seek a refund of the unconstitutional HMT. The Federal Circuit's *Swisher* decision does not alter this remedy and, therefore, there is no reason to grant a petition for a writ of certiorari to review the lack of time limitations on refund claims.

In seeking a petition for a writ of certiorari, the Government is only trying to delay and impede the refunds of an unconstitutional tax. This delay will unnecessarily harm those companies and individuals who have been economically prohibited from maintaining a legal action to obtain refunds of the unconstitutional HMT.

Amicus curiae respectfully requests this Court to deny the petition for a writ of certiorari.

ARGUMENT

I. THE DECISION OF THE FEDERAL CIRCUIT IN THIS CASE WILL HAVE NO RECURRING IMPACT ON THE ADMINISTRATION OF THE CUSTOMS LAWS.

A. The Procedural Dispute Here Is Unique To The Context Of The Export HMT.

In *U. S. Shoe*, this Court unanimously held that the HMT violated the Export Clause of the Constitution, insofar as the HMT applied to exports. The substantive legal issue, regarding whether the HMT may be imposed on exports, has thus been conclusively decided. The instant case involves nothing more than a determination of whether it was proper to follow the procedures established in a regulation, 19 C.F.R. § 24.24(e)(4), promulgated by Customs pursuant to the authority granted to Customs by Congress in the Water Resources Development Act, 26 U.S.C. § 4462 (1994), to claim a refund of the unconstitutional HMT. The current dispute is thus confined solely to the issue of the correct procedures to follow to obtain a refund of the unconstitutional HMT on exports. Especially since the unconstitutionality of the export HMT has now been finally determined by this Court, the decision of the Federal Circuit on the very narrow procedural point actually presented by this case is of no

recurring importance to the routine administration of the Customs laws.

B. The Federal Circuit's Decision Does Not Change Existing Practice And Is Not Inconsistent With The Holding In *U. S. Shoe.*

To the extent that it has any application beyond the narrow facts to which it is bound, there is little likelihood that, as a matter of practice, the Federal Circuit's decision in *Swisher* will cause any confusion among practitioners or the courts regarding the application of 28 U.S.C. § 1581. The relationship between the various subsections of § 1581 is well established, and *Swisher* is well within that established understanding. The Federal Circuit's decision is also not inconsistent with the jurisdictional ruling this Court made in *U. S. Shoe*.

Congressional intent is established here. In enacting 28 U.S.C. § 1581(i), Congress intended to grant the Court of International Trade ("CIT") broad, exclusive jurisdiction over any civil action arising out of import transactions. *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994) ("*Conoco*") (*citing* H.R. Rep. No. 96-1235, at 21, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3732) ("H.R. Rep. No. 96-1235"). The legislative history and the plain language of the statute make it clear that 28 U.S.C. § 1581(i) is intended to broaden, rather than narrow, the jurisdiction of the CIT. *Id.* At the same time, "Congress also indicated that '[s]ubsection (i) is intended only to confer subject matter jurisdiction

upon the court, and not to create any new causes of action not founded in other provisions of law.'" *Phibro Energy, Inc. v. Franklin,* 822 F. Supp. 759, 761 (Ct. Int'l Trade 1993) (*quoting* H.R. Rep. No. 96-1235, at 47, *reprinted in* 1980 U.S.C.C.A.N. 3758-59).

The Government, in its Petition, makes much of the limitation on the CIT's jurisdiction under 28 U.S.C. § 1581(i) stated in *Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988), but that limitation must be read in context. Indeed, in that very case, while the Federal Circuit held that § 1581(i) should not be relied upon "when jurisdiction under another subsection of § 1581 is or could have been available," *id.* at 963, it went on to qualify that limitation by saying it would apply "unless the remedy provided under the other subsection would be manifestly inadequate." *Id.; see also United States v. Uniroyal,* 687 F.2d 467, 475 (C.C.P.A. 1982); *National Corn Growers v. Baker,* 840 F.2d 1547, 1557 (Fed. Cir. 1988). In other words, if it would be *unfair* to force a party to proceed under one of the other subsections of § 1581, the CIT may, in its discretion, permit the claim to be brought under § 1581(i). A finding that jurisdiction may be invoked under § 1581(i) in one particular case, however, does not necessarily preclude a finding of jurisdiction under another subsection of § 1581 in another case raising a similar legal issue under different factual and procedural circumstances. For example, in *Conoco*, the Federal Circuit held that the CIT had jurisdiction under § 1581(i), notwithstanding the potential availability of jurisdiction under § 1581(b), because pursuit of a

remedy under § 1581(b) in that situation would have been "futile and inappropriate." *Conoco,* 18 F.3d at 1587 (*quoting Leather Goods Manufacturers of America v. United States*, 588 F. Supp. 1413, 1421 (Ct. Int'l Trade 1994). Thus, *Conoco* clearly recognized that *another party* raising the same legal issue as the plaintiff in *Conoco*, *could have* proceeded under § 1581(b), but based on the *particular circumstances* of that case, the court recognized jurisdiction under § 1581(i).

Conoco, in turn, is consistent with a number of prior cases regarding this issue, including cases in which the CIT exercised its discretion to allow two bases of jurisdiction within a single cause of action in the same case. In *Detroit Zoological Soc'y v. United States*, 647 F. Supp. 147 (Ct. Int'l Trade 1986), the plaintiff wished to amend and supplement its complaint to allege jurisdiction over the denial of protests which had occurred after the original complaint was filed. The CIT took into consideration the inconvenience and the time involved in filing a new suit, and permitted the plaintiff to supplement its complaint to add its claims under § 1581(a), in addition to its earlier § 1581(i) claims. *Id.* at 149-50. Similarly, in *Carnival Cruise Lines, Inc. v. United States*, 866 F. Supp. 1437 (Ct. Int'l Trade 1994), the CIT permitted the plaintiff to amend its complaint to include the protests which were denied after the original complaint was filed. As a result, the plaintiff was able to invoke claims under § 1581(a), in addition to its earlier jurisdictional claims under § 1581(i), because dismissing the later claim would be "an empty formalism." *Id.* at 1442.

In practice, the appropriate jurisdictional basis for a given cause of action thus turns on the procedural posture of the particular case, the unique circumstances of the plaintiff, and the discretion of the court. Pursuant to 28 U.S.C. § 2637(d), the CIT has discretion to require exhaustion of administrative remedies or to waive the same. In situations involving 28 U.S.C. § 1581(i), the courts have waived exhaustion where the administrative remedy will be inadequate or futile. For example, in *Conoco* — which involved a challenge to a Foreign-Trade Zones Board decision — exhaustion was waived because the court found that the protest procedure under 28 U.S.C. § 1581(a) would have been ineffective. 18 F.3d at 1587. Because the facts of each case underlying the jurisdictional claims under 28 U.S.C. § 1581 are different, it would be inappropriate to proclaim a single jurisdictional basis for a cause of action that fits all factual scenarios.

The *Swisher* decision is not inconsistent with the holding in *U.S. Shoe*. In *U.S. Shoe*, this Court found that CIT jurisdiction over controversies regarding the administration and enforcement of the HMT "accords with § 1581(i)(4)." 523 U.S. at 366. This Court based its ruling on a circumstance where no protest had been filed, and with the notation that, when "Customs . . . issues no directives . . ." and "merely passively collects HMT payments," then "protests are not pivotal." *Id.* at 365 (internal quotes omitted). This Court did not purport to rule on whether jurisdiction would have been appropriate

under § 1581(a) where there had actually been a denial of a protest filed by some other party, who was only following a regulation that Customs had promulgated. In this case, the procedures followed by Swisher International, Inc. ("Swisher") were clearly set forth in Customs' regulation implementing the HMT, as noted below.

This Court did not hold in *U.S. Shoe* that a party who willingly chose to comply with the specific administrative procedures promulgated by Customs could not seek judicial redress under § 1581(a). Thus, the Federal Circuit's decision that Swisher could properly proceed under that subsection, based on the unique factual and procedural posture of the case, is in not inconsistent with this Court's holding in *U.S. Shoe*.

C. The Procedures At Issue Are Within The Agency's Discretion.

The administrative remedy provided by Customs was fully within the framework fashioned by Congress. When Congress enacted 26 U.S.C. §§ 4461, 4462 — the statute authorizing the HMT — it authorized Customs to promulgate regulations and establish administrative procedures to implement the tax. Pursuant to this authority, Customs promulgated 19 C.F.R. § 24.24 to establish payment and refund procedures. While there are time limits for protesting the denial of refunds, which were followed here, 19 C.F.R. § 24.24 does not contain any limit on the time during which a party may seek a refund in the first instance. This merely follows the

intent of Congress, which, when enacting the HMT, chose not to impose a time limitation on the period during which a claim for a refund could be made. The Federal Circuit's *Swisher* decision does not affect these decisions made by Congress and Customs, and, therefore, there is no reason to grant a petition for a writ of certiorari to review the lack of time limitations on refund claims.

II. THE GOVERNMENT SEEKS TO EVADE THE RESULTS OF THIS COURT'S HOLDING IN *U.S. SHOE*.

As noted above, the underlying constitutional claim has already been decided by this Court. Instead of complying with the Court's decision, however, the Government has sought to delay and impede the application of this Court's holding in the *U.S. Shoe* case by asserting that all manner of procedural obstacles stand in the way of exporters' legitimate claims. The petition at hand is nothing but another attempt at delaying the provision of meaningful relief to the injured exporters.

In particular, the Government's tactics unnecessarily harm those companies and individuals who, while legally entitled to a refund of payments made pursuant to the unconstitutional HMT on exports, have heretofore been economically prohibited by the cost involved in maintaining a legal action to attempt to obtain those refunds. *Swisher,* 205 F.3d at 1368. Exporters that did not have a sufficient amount of payments of the unconstitutional HMT during the statutory

limitations period applicable to claims filed under 28 U.S.C. § 1581(i), however, may well have a sufficient amount of payments since the date of enactment of the HMT law to justify filing *Swisher*-type claims under 28 U.S.C. § 1581(a). For this reason as well, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Sidney N. Weiss
Counsel of Record
President
Customs and International
Trade Bar Association
90 Park Avenue, 17th Floor
New York, NY 10016
(212) 986-5309
Counsel for *Amicus Curiae*

OF COUNSEL:

M. Page Hall, II
Dorsey & Whitney LLP
1001 Pennsylvania Avenue, N.W.
Suite 300 South
Washington, D.C. 20004

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No. 00-415

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SWISHER INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Pet

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In the Supreme Court of the United States

No. 00-415

UNITED STATES OF AMERICA, PETITIONER

v.

SWISHER INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent is incorrect in contending (Br. in Opp. 1, 13-14) that the position taken by the United States concerning the importance of the jurisdictional issue in *this* case is inconsistent with the position that we took concerning the importance of the jurisdictional issue in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). In our petition in *United States Shoe*, we noted that the question whether jurisdiction existed under 28 U.S.C. 1581(a) or instead under 28 U.S.C. 1581(i) was not critical in *that* case because the taxpayer in that particular case had timely preserved claims under *both* jurisdictional theories. See 97-372 Pet. at 7 n.2. In the present case, however, the taxpayer did *not* timely preserve its claim under the statute of limitations that

applies to claims brought within the "residual" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(i). See Pet. 9, 21. Under the holding of this Court in *United States Shoe*, respondent's claims come within the "residual" jurisdiction of the Court of International Trade under Section 1581(i) and should therefore be dismissed because they are barred by the statute of limitations. See Pet. App. 25a-26a. This case thus presents two important issues that were *not* presented in *United States Shoe*: (i) whether the court of appeals erred in refusing to follow the holding of *United States Shoe* that the "residual" jurisdiction of Section 1581(i) applies in these refund cases and (ii) whether the court of appeals incorrectly held that jurisdiction may exist *simultaneously* under both Section 1581(a) and Section 1581(i).

The first of these two questions is of obvious recurring importance, for the Federal Circuit should not be allowed to contradict the decisions of this Court that establish the proper operation of the federal statutes that authorize and limit monetary recoveries against the United States. When, as here, "a precedent of this Court has direct application in a case," the courts of appeals are to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

The second jurisdictional issue described above is also of broad and recurring importance, for that holding of the court of appeals would make the exhaustion of available administrative remedies discretionary, rather than mandatory, for claimants in the Court of International Trade. The conclusion of the court of appeals that a claimant may elect to proceed under the "residual" provision of Section 1581(i) even if it had failed

to exhaust a "protest" within the court's jurisdiction under Section 1581(a) violates the established principle, correctly recognized by the trial court, that "if one had the opportunity for access to the court under 28 U.S.C. § 1581(a), * * * there is no § 1581(i) jurisdiction." Pet. App. 27a. See also *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988). This holding of the court of appeals would also, for the reasons carefully explained in this case by the Court of International Trade, allow claimants to manipulate and avoid the statutes of limitations enacted by Congress to govern such claims. See Pet. App. 32a-33a; Pet. 20-21.

2. Respondent states that it is "unremarkable" that the court of appeals concluded that "different administrative procedures may provide different bases for jurisdiction" in the Court of International Trade because a single type of Customs action is often subject to review under different portions of the jurisdictional provisions of Section 1581 (Br. in Opp. 12, 18-19). While administrative actions may sometimes yield different jurisdictional options under Section 1581(a)-(h), that is plainly *not* the case when the "residual" jurisdiction of Section 1581(i) is invoked. In enacting this "residual" jurisdiction, it is clear that "Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." *United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 471 (C.C.P.A. 1982). See Pet. 17 n.6. Indeed, as even respondent ultimately acknowledges, "Congress did not intend this residual jurisdiction, which was first created in 1980, to encompass causes of action that were the traditional and

exclusive province of protest jurisdiction" (Br. in Opp. 6).

By allowing a claimant to elect whether or not to exhaust available remedies—and thereby providing the claimant with the power to determine whether (and when) the statute of limitations on its claim commences to run—the decision in this case is both "remarkable" and unprecedented. As the Court of International Trade stated in rejecting respondent's novel jurisdictional theory, a claimant should not be permitted to "unilaterally grant itself a new limitations period by making a refund request whenever it so chooses." Pet. App. 33a.

3. Respondent attempts to mask its fundamental disagreement with the decision in *United States Shoe* by contending that it has pursued a "third" jurisdictional option that was not addressed in that case (Br. in Opp. 17). But the "third" option that respondent describes is simply a "protest" from the denial of a refund request. If such a "protest" option is available to respondent, it would also have been available to the claimant in *United States Shoe*. And, if such a protest option were available to the claimant in *United States Shoe*, then "residual" jurisdiction would not have existed in that case—for, if the exporters "could have taken steps" to protest but failed to do so, the "residual" jurisdiction of the Court of International Trade cannot apply. *Miller & Co.* v. *United States*, 824 F.2d at 963. See also *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984).

Respondent is also incorrect in asserting (Br. in Opp. 15-16) that its jurisdictional theory was neither presented nor considered in the *United States Shoe* case. In fact, respondent's jurisdictional theory was ex-

pressly considered and squarely rejected in that case (as well as in the present case) by the Court of International Trade. *United States Shoe Corp.* v. *United States*, 19 Ct. Int'l Trade 1284, 1300 (1995), aff'd, 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). In the *United States Shoe* case, respondent appeared as an *amicus curiae* and presented its jurisdictional arguments not only to the Court of International Trade but also to the Federal Circuit. Pet. App. 26a. In addressing and resolving this jurisdictional issue in *United States Shoe*, this Court was, of course, fully aware of the reasoning and conclusions of the lower courts which had specifically addressed and rejected respondent's theory in that case. And, of course, the record of *United States Shoe* contained the *amicus* briefs that respondent filed in the lower courts in that case. In concluding that the "residual" jurisdiction of the Court of International Trade applied in *United States Shoe*, 523 U.S. at 365, this Court necessarily rejected the availability of *all* avenues of protest jurisdiction—including the route that respondent had raised, and that the lower courts had rejected, in that very case.

Respondent is clearly wrong in suggesting that this Court elected silently to "waive the exhaustion requirement" in *United States Shoe* "rather than require that exporter to request a refund from Customs" (Br. in Opp. 20-21). This Court did not "waive the exhaustion requirement" in *United States Shoe*. To the contrary, the court emphasized the critical importance of the exhaustion requirement, noting that a protest "is an essential prerequisite" that must be followed by the claimant to establish jurisdiction in customs cases. 523 U.S. at 365. It was precisely because of the Court's conclusion that there is no available protest route for "con-

troversies regarding the administration and enforcement of the [Harbor Maintenance Tax]" that the Court held that the "residual" jurisdiction of the Court of International Trade *is* available under Section 1581(i). 523 U.S. at 366.

4. Notwithstanding the contrary holding of this Court in *United States Shoe*, respondent argues that the denial of its refund request should be treated as if it were a protestable "decision" as to a charge or exaction under 19 U.S.C. 1514(a)(3). The only case cited by respondent for that theory (Br. in Opp. 25) is *Eurasia Import Co.* v. *United States*, 31 C.C.P.A. 202 (1944). But the conclusion that respondent purports to draw from that decision was specifically rejected by the same court in its subsequent decision in *Carlingswitch, Inc.* v. *United States*, 651 F.2d 768, 773 (C.C.P.A. 1981). In *Carlingswitch*, the court of appeals expressly held that "a refusal to refund money is not a § 1514 'charge or exaction'" which may be protested. *Ibid.* Protests under subsection 1514(a)(3) are to be made from the "actual assessments of specific sums of money" and not from any subsequent refusal to refund that money. *Id.* at 771, 773. Otherwise, a claimant would hold the key to the statute of limitations in his pocket, for he could manufacture "a new limitations period by making a new request for refund whenever [he] chooses." Pet. App. 33a. As the Court of International Trade emphasized in its decision below, that precise defect is a central feature—and not merely an accidental by-product—of respondent's flawed position in this case. *Ibid.*

Respondent did not protest a Customs decision to "assess" or "exact" money. Instead, respondent purportedly protested a Customs decision that refused to refund amounts that had been assessed and collected in

years long past.* Respondent's assertion that the refusal of the Customs Service to grant a request for refund is a protestable decision within the meaning of 19 U.S.C. 1514(a)(3) conflicts not only with the holding of this Court in *United States Shoe* but also with the longstanding precedent of the Federal Circuit itself in the *Carlingswitch* case. Respondent is thus simply wrong in asserting that the decision in this case is consistent with "fifty years of precedent" (Br. in Opp. 10). To the contrary, the decision in this case unsettles established rules for the adjudication of customs cases and, in doing so, departs radically from the recent, controlling decision of this Court on this very subject.

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

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* Congress has been quite specific in delineating the situations in which it has determined to allow a protest of the Service's "refusal" to take action. See 19 U.S.C. 1514(a)(6)-(7) (authorizing protests of Customs' "refusal" to "pay a claim for drawback" or "refusal" to "reliquidate an entry").